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**REPORTS**  
**OF**  
**CASES DETERMINED**  
**BY THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF MISSOURI**

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Between January 26, 1920, and April 1, 1920.

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**PERRY S. RADER,**  
**REPORTER.**

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**VOL. 281.**

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JUN 9 1921

# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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HON. ROBERT FRANKLIN WALKER, Chief Justice.

HON. JAMES T. BLAIR, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. FRED L. WILLIAMS, Judge.

HON. WALLER W. GRAVES, Judge.

HON. RICHARD L. GOODE, Judge.

HON. JOHN I. WILLIAMSON, Judge.

---

FRANK W. McALLISTER, Attorney-General.

J. D. ALLEN, Clerk.

H. C. SCHULT, Marshal.



# JUDGES OF THE SUPREME COURT

BY DIVISIONS.

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## DIVISION ONE.

HON. JAMES T. BLAIR, Presiding Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. WALLER W. GRAVES, Judge.

HON. RICHARD L. GOODE, Judge.

HON. STEPHEN S. BROWN, Commissioner.

HON. WILLIAM T. RAGLAND, Commissioner.

HON. CHARLES EDWIN SMALL, Commissioner.

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## DIVISION TWO.

HON. FRED L. WILLIAMS, Presiding Judge.

HON. ROBERT FRANKLIN WALKER, Judge.

HON. JOHN I. WILLIAMSON, Judge.

HON. NORMAN A. MOZLEY, Commissioner.

HON. ROBERT T. RAILEY, Commissioner.

HON. JOHN TURNER WHITE, Commissioner.

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CASES DETERMINED  
BY THE  
SUPREME COURT  
OF THE  
STATE OF MISSOURI

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OCTOBER TERM, 1919.

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(Continued from Vol. 280]

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THE STATE *ex rel.* BOATMEN'S BANK *v.* GEORGE  
D. REYNOLDS *et al.*, Judges of St. Louis Court  
of Appeals.

*In Banc*, January 28, 1920.

1. **CONFLICT IN OPINIONS: Certiorari to Court of Appeals: Unjust Decision.** Upon *certiorari* directed to a Court of Appeals based on an allegation of a conflict of its opinion in a given case with prior decisions of the Supreme Court, the Supreme Court cannot interpose merely because it may regard the decision of the Court of Appeals as unjust. The sole inquiry is: Is the opinion in conflict with controlling decisions of the Supreme Court? If it is, the record must be quashed; if it is not, the writ must be quashed.
2. **SEWER DISTRICT: Lot: Definition.** Section 14 of Article 6 of the Charter of St. Louis relates, not to sewer districts, but to the construction of streets, boulevards and alleys, and the word "lot" used therein is required to be construed "as used in this section," and is not to be understood as a definition of "the lots of ground" and "the lots and parcels of ground" used respectively in Sections 21 and 22, which relate to district sewer and joint sewer districts, according to which assessments of benefits are made by area, and not by front-footage, and wherein the words "lot" and "parcels of ground" are used as equivalent terms.
3. ———: **Tax Bills: Against Lots Instead of Whole Tract: Dedication of Streets.** Where the recorded plat divided a tract into seven lots, designating streets and alleys thereon, separate tax bills to pay the costs of constructing a district sewer may, under the charter

## State ex rel. Boatmen's Bank v. Reynolds.

of St. Louis, be issued against the lots severally, and are not void because one tax bill was not issued against the tract as a whole, although the streets and alleys have not been actually established; nor is there anything in *Bambrick Bros. Construction Co. v. Semple Place Realty Co.*, 270 Mo. 450, that requires the assessment to be made by one tax bill against the entire tract. Nor was it necessary that there should have been a dedication of the streets and alleys to public use, according to the recorded plat, in order to give validity to the tax-bills.

4. ———: ———: **Substantial Compliance With Charter Provisions.** If charter provisions concerning the assessment of benefits for a public improvement have been substantially complied with and the improvement has been made according to contract, irregularities which do not injuriously affect the interests of the property-owner should not be permitted to defeat a suit on the tax bills; and where such is the case, a ruling by the Court of Appeals that such irregularities render the tax bills void and in the same opinion denouncing the ruling as unjust, is in conflict with *Sheehan v. Owen*, 82 Mo. 458.
5. ———: ———: **Directory Provisions.** A charter provision concerning a district sewer which requires the issuance of "a special tax-bill against each lot in the district" should be held, in the absence of a showing of some loss or damage to the property owner, to be directory only; and where the sewer has been constructed in substantial compliance with charter provisions and the contract, a holding that such a requirement is mandatory and the tax bills void because the entire assessment was not included in one tax bill against the entire tract, is to confiscate the labor and material which went into its construction, and is in conflict with *Granite Bituminous Paving Co. v. McManus*, 244 Mo. 184.

*Certiorari.*

## RECORD QUASHED.

*Jehmann & Lehmann, Paul V. Janis and Thos. R. Reyburn* for relator.

(1) The Court of Appeals, in deciding the case of *Boatmen's Bank, v. Semple Place Realty Co.* failed and refused to follow the last controlling decisions of the Supreme Court in the following cases: *Bambrick Bros. Const. Co. v. Semple Place Realty Co.*, 270 Mo. 450; *State ex rel. v. St. Louis*, 211 Mo. 606; *Sheehan v. Owen*, 82 Mo. 465; *Neil v. Ridge*, 220 Mo. 233; *State ex rel. v. Eicher*, 178 S. W. 174.

*Eliot, Chaplin, Blayney & Bedal* for respondents.

(1) The Supreme Court, in reviewing the decision of the Court of Appeals upon *certainari* only determines whether the Court of Appeals in announcing the law of the case upon the facts as stated in its opinion failed to follow the last previous ruling of the Supreme Court. *State ex rel. Peters v. Reynolds*, 214 S. W. 122. (2) *Bambrick Brothers Const. Co. v. Semple Place Realty Co.*, 270 Mo. 450, is not a last controlling decision. (a) In the *Bambrick* case the Court was dealing with tax bills of a "joint district sewer." In the instant case the Court of Appeals was dealing with the tax bills of a "district sewer." These are different. Former Charter of St. Louis, sec. 20, art. 6; *Prior v. Const. Co.*, 170 Mo. 442. (b) The charter provision for issuance of tax bills for joint district sewers is different from that for district sewers, to-wit, in joint district sewers the tax bills are issued against "all of the lots or parcels of ground." Former Charter of St. Louis, sec. 22, art. 6. In sewer districts against "all the lots." Former Charter of St. Louis, sec. 21, art. 6. (c) The decision in the *Bambrick* case turned on whether the tax bills were issued against "parcels of ground," which was not and could not be in the instant case. (3) *State ex rel. Skrainka Construction Company v. City of St. Louis*, 211 Mo. 591, is not a last controlling decision. (4) Neither is *Sheehan v. Owen*, 82 Mo. 458, nor *Neil v. Ridge*, 220 Mo. 233, nor *State ex rel. v. Eicher*, 178 S. W. 171, a last controlling decision.

WILLIAMSON, J.—We turn to the opinion of the Court of Appeals for the following statement of the facts:

"This in an appeal by plaintiff from a judgment of the Circuit Court of the City of St. Louis in favor of the defendants upon certain special tax bills issued for the work of constructing sewers in Harlem Creek Sewer District No. 7 in St. Louis. The seven tax bills in issue aggregate \$5,750.61.

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"It is not necessary to set forth the petition in the case, as its sufficiency is not challenged. The petition is in the usual form to enforce the alleged lien of seven special tax bills issued July 29, 1912, to the plaintiff bank's assignor, by the City of St. Louis, for the alleged construction of district sewers against seven alleged separate parcels of land in St. Louis, according to streets and alleys conforming to those shown on a plat of the so-called Semple Place, recorded in the office of the Recorder of Deeds of the City of St. Louis, on December 24, 1892.

"As to the answer it is sufficient to state that, among other things, it alleges that the lots or parcels of land against which the seven tax bills were issued constituted one entire tract of land which, since January 1, 1909, was the private property of defendant, J. Denniston Lyon, trustee under the will of Charles J. Clarke, deceased; that the tract had never been laid out or subdivided, and that Kossuth, Brown and Slevin avenues in said tract, and upon which parts of the sewers in question were laid, were the private property of defendant, J. Denniston Lyon, trustee. That parts of the sewers in question were constructed on the said so-called streets and alleys without the consent of the said trustee, Lyon, or the beneficiaries of the trust. The answer then alleges that each tax bill is void because it is assessed against a part of a single parcel of land; because the ordinances are invalid in that they require parts of the sewer to be built on the private property of the defendants; because the enforcement of the bills would deprive the defendants of their property without compensation or due process of law, contrary to the Constitution of the United States and of the State of Missouri.

"The answer, as stated, is pleaded in seven counts, each count being directed at a count in the petition, and each setting up, among others, the above defenses. The answer to each count, however, includes a prayer that should the tax bills be held valid, nevertheless the court should reduce the tax bills to such an amount as would represent the proportion of the cost of the

sewers, exclusive of those constructed on defendant's land. The reply was a general denial.

"As to the trial, plaintiff having made out a prima-facie case, the defendants offered in evidence deeds affecting title to the lots described in the tax bills and embracing the land included in the sewer bills, and also other land, and affected by this suit. These deeds show that the land in question, together with other land, was conveyed by Charles J. Clarke and wife to John V. Hogan on October 11, 1892; that on said date said Hogan executed a deed of trust on the said land, including the land in question, to William Booth, trustee for the said Charles J. Clarke. On November 15, 1902, said Hogan conveyed the land in question, by warranty deed, to the Semple Place Realty Company. Defendant next offered in evidence the plat of Semple Place, executed December 6, 1892, by the Semple Place Realty Company, John V. Hogan and one Christiana Winklemeyer, acknowledged and recorded in the Recorder's office of the City of St. Louis, December 24, 1892, said plat subdividing the land against which the said tax bills were issued, into lots described in said tax bills, the streets and alleys being designated thereon.

"The deed of trust on the said land, of October 11, 1892, was foreclosed and the defendants offered in evidence a trustee's deed from William Booth, trustee for John V. Hogan, to Charles J. Clarke, dated May 17, 1897, reconveying said land, which had been subdivided, as aforesaid, and a plat thereof recorded. Defendants also introduced the will of said Clarke, showing the probate thereof of January 7, 1900, by which will John V. Hogan and Frank Semple were made trustees for the residuary estate embracing, among others, the land against which the tax bills were issued, for the benefit of defendants, Louisa S. Clarke, Thomas S. Clarke, Louis S. Clarke, Joseph K. Clarke, Mabel McCrea, Mildred Painter, Clarke Painter and Alden Painter.

"Defendants introduced testimony which was not contradicted, to the effect that a portion of the sewer con-



structed under the ordinances creating the sewer district was located on what was alleged to be Brown, Slevin and Kossuth avenues and certain alleys, all of which said streets and alleys were located on a part of said Semple Place, as appears on the recorded plat thereof, herein-after mentioned.

"Leo Osthaus, the Assessor of Special Taxes for the City of St. Louis, a witness for the defendants, testified that part of the sewer district had been constructed upon the above named avenues and alleys as shown on the recorded plat of Semple Place, and that he had assumed from the recorded plat that these avenues were open streets, but that at the time of the drawing of the bills in suit he had not personally known anything about the physical characteristics of the particular parcels of land and had not seen the land prior to that time, but that he had assessed the property according to the plat, which showed the streets and alleys thereon, as shown by the said records, since 1892, and that in calculating the area of the district against which the tax was assessed the witness had treated the so-called streets and alleys in Semple Place as open streets and alleys and not as belonging to the Clarke estate, but as highways.

"On cross-examination the witness testified that in figuring out the area of defendants' property, to be charged with its proportion of the costs of the entire sewer, the area of the streets and alleys claimed by defendants to be private property, had been excluded, to-wit, 123,151 square feet; that the total cost of the sewer was \$89,717.98; that the cost of the construction of that part of the sewer of which defendants complain, namely, on Brown, Kossuth and Slevin avenues, and the alleys, as shown on the plat of Semple Place, was \$2,872.36; that if there was deducted from the total cost of the sewer the cost of constructing the sewers claimed to be on the private property of the defendants, the total cost of the sewer would be reduced to \$86,845.42; that if the defendants' property was treated as one entire tract, and if the area of the streets and alleys which defendants

claim to be private property, are figured in determining defendants' proportion of the reduced cost of the sewer, then in spite of the reduction of the total cost of the sewer from \$89,717.98 to \$86,845.42, the plaintiff's proportion of the reduced total cost, by reason of the increased area caused by the inclusion of the streets and alleys which defendants claim are private property, will be \$7,179.55, instead of the present charge against the property of \$5,750.61; that the general taxes had been assessed against the property according to the said recorded plat of Semple Place, said assessment for general taxes treating the streets and alleys shown on the plat as though such streets and alleys were public property, and that the general taxes had been paid since 1892 on the city blocks as shown on the plat, and no taxes paid on the streets and alleys claimed to be private property, as designated on the plat.

"Charles R. Skinker, a witness for defendants, testified that he had known the land against which the tax bills sued upon were issued since prior to 1908 and continuously from that time up to the date of the trial; that prior to the enactment of ordinances for the construction of the sewer for which the tax bills here sued upon were issued, the said land was surrounded by one wire fence, without any buildings or improvements of any kind upon it; without any open ways or streets; with a great many trees upon it, and had previously been used for pasture for herds of cattle for a neighboring dairy; that the defendants are all residents of Pennsylvania or New York and have been non-residents for many years. The witness further testified that he had been the attorney for Mr. Lyon, one of the trustees, since 1910; that the witness had first learned of the construction of the sewer when the bills were presented to him for payment, and he went out to the land and found scars on the land where the sewer had evidently been laid; that the defendants had given no permission or license to build sewers on this land; that there had never been any streets upon the property, or alleys, and up to the time of the trial there

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was no evidence that there ever had been any streets on the land.

"Thereafter, the court found the issues joined on each of the seven counts of the petition in favor of all defendants upon the pleadings and proof adduced, and adjudged that plaintiff take nothing by said counts; that all defendants be discharged and recover of plaintiff their costs of the action. Plaintiff in due time filed a motion for new trial, which was subsequently overruled, and plaintiff appeals."

The case of Bambrick Bros. Construction Co. v. Semple Place Realty Co., 270 Mo. 450, was a suit concerning the validity of sewer tax bills affecting the same property here in question and against the same defendants. In the Bambrick case, as here, seven tax bills had been issued against the seven lots in Semple Place, and it was claimed there, as here, that the tax bills so issued should have been issued as one instead of seven, and against Semple Place as a whole instead of the lots composing it. The only difference, if any, lies in the fact that, in the Bambrick case, the tax bills were issued for the construction of a joint district sewer, while in the pending case they were issued for the construction of a district sewer. In the Bambrick case we held the seven joint district sewer bills valid while in the case in hand respondents have held the seven district sewer bills void. These bills amount to \$5750.61. That the sewers were properly built, under proper authority and that the tax bills were issued for the correct amount is not questioned. As stated, the vital defect is said to be that seven bills were issued instead of one. It is not claimed that the property owners are compelled to pay more, nor that the benefits to them are less, by reason of that fact, nor that they are otherwise injured in any respect. In other words, the bald, technical defense is made that because the bills are seven in number, instead of one, and against seven lots, instead of against a tract enclosing those lots, therefore the property owners are

absolved from paying anything. " 'Tis a great price, for a small vice."

To state this proposition is to demonstrate its injustice. Indeed, the learned respondents were so deeply impressed with the unconscionable character of this claim that upon a rehearing granted by them, they denounced their own decision as one "obviously inequitable and unjust," but felt themselves bound to adhere to it because of "controlling opinions of the Supreme Court touching the matter in hand." However, under the limitations imposed upon us in proceedings by *certiorari*, we are not at liberty to interpose merely because we may regard the decision as unjust. Our sole inquiry is: Is the opinion in conflict with our own controlling decisions? If it is, we must quash the record. If not, we must quash the writ. [State ex rel. Peters v. Reynolds, 214 S. W. 121.]

Counsel for respondents tersely state their contention as follows: "To summarize, tax bills in a district sewer improvement are only issued against lots as defined in the Charter, but in a joint district sewer improvement may be issued either, (a) against lots, or (b) parcels, i. e., in the instant case (involving a district sewer), the tax bills to be valid must be issued against lots, but in the Bambrick case they could be issued either against lots or parcels of ground."

The reason is said by respondents' counsel, to lie in the difference in phraseology of Section 21 of Article VI of the Charter of the City of St. Louis; concerning district sewers, and Section 22 of the same article of the same charter, concerning joint district sewers, when construed in the light of Section 14 of that article, defining the word lot. Counsel contend that Semple Place is "a parcel of ground," and not a lot or lots; that district sewer tax bills cannot issue against "parcels of ground," but against lots only, and even then such bills can issue against such lots only as conform to the charter definition of lot as found in Section 14 of the charter, and hence the tax bills here in suit are void. The question

is thus presented whether or not the charter definition of lot, found in Section 14, shall be held to apply to the word lot as used in Section 21. So much of Article VI of the Charter of St. Louis as is deemed pertinent to this question, is as follows:

Sec. 21. "As soon as a district sewer . . . is . . . completed, the Sewer Commissioner shall cause to be computed the total cost . . . and certify the same to the president of the Board of Public Improvements, and the president . . . shall assess it as a special tax against all the lots of ground in the district respectively. . . ."

Sec. 22. "Whenever the whole or a section of a joint district sewer is fully completed, the Sewer Commissioner shall cause the total cost . . . to be computed, and shall certify to the president of the Board of Public Improvements, and the president . . . shall assess it against all of the lots or parcels of ground in the joint sewer district . . ."

Sec. 14. "The word 'lot' as used in the section, shall be held to mean the lots as shown by recorded plats of additions or subdivisions, but if there be no such recorded plat, or if the owners of property have disregarded the lines of lots as platted and have treated two or more lots or fractions thereof as one lot, then the whole parcel of ground or lots so treated as one shall be regarded as a lot for the purpose hereof."

It will be noted that Section 21 provides that the tax shall be assessed against "all the lots of ground." Section 22 uses the words "all of the lots or parcels of ground." Upon that difference the fate of the tax bills here in suit is said to hang. We take judicial notice of the provisions of the Charter of the City of St. Louis (Mo. Cons. Art. 9, sec. 21; Jennings Heights Land & Imp. Co. v. City of St. Louis, 257 Mo. 291, 1. c. 300), and hence we know that Section 14 of the charter, *supra*, relates, not to sewers districts, but as its title states, to the "Construction of Streets, Boulevards and Alleys," a

wholly different topic. Scanning the paragraph defining the word lot, we find that it is expressly limited to a definition of that word "as used in this section." These are plain words, and plainly limit the charter definition of the word lot to Section 14. A reason for that limitation will presently appear. Section 14 provides, among other things, for the construction of pavements and sidewalks and for repairing them, and for the issuance of special tax bills for the cost thereof. The method of determining the amount of such tax bills, as against any particular tract of land is, as to sidewalks, the familiar one of assessing against each lot such a proportion of the total tax as the front feet of that lot bear to the total number of linear feet of all property abutting on the sidewalk so to be constructed. As to paving, curbing and guttering, one-fourth of the cost is assessed in like manner, and the remainder is levied upon a benefit district. District sewer and joint district sewer tax bills are levied upon a different plan, namely, upon the proportion of the area of each particular tract to the area of the entire district, without regard to street frontage. [See Sections 21 and 22, Charter of St. Louis, *supra*.] Furthermore, districts for laying sidewalks, curbing, guttering and otherwise improving, or for constructing boulevards, streets and alleys, are required by other portions of Section 14 to be laid out with special reference to lots: "the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved," but "if there is no parallel or converging street on either side of the street to be improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved," to quote the language of Section 14; whereas, sewer districts may be of such form and dimensions as may be prescribed by ordinance, without regard to streets or lots. These differences are sufficient reasons both for the peculiar limitation placed upon the word "lot" as used in Section 14 by the charter definition above quoted, and also for the fact that that special definition is expressly limited to the use of that word in that section. So defined, it has no

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relevancy to Sections 21 and 22. Under Section 14, a lot having no street frontage would pay no sidewalk tax, and only a three-fourths assessment of paving tax, but it would be taxed its full assessment under Sections 21 and 22 for sewer purposes, regardless of its lack of street frontage. It follows that as to Sections 21 and 22 of the charter, then, the word lot is released from the limitations set upon it by Section 14, and hence is to be understood in its usual and ordinary meaning. In "Soule's Dictionary of English Synonyms," the word lot is said to be synonymous with "portion, parcel, division, part, piece of land." Webster defines it as follows: "The term lot may refer to a large piece [of land], such as is usually called a field, tract, parcel, block, etc." A standard legal text defines lot as follows: "Applied to real estate, it is a term of indefinite meaning, and must be interpreted with due regard to the context and the subject-matter: thus the word may be employed as referring to a division, parcel, piece, portion or tract of land." [25 Cyc. 1629.] Since the charter definition of lots applies only to the section relating to streets, the construction based upon that definition of Sections 21 and 22, relating to sewers, falls to the ground. Absent that artificial and forced construction, "lots" and "parcels of ground" may be used as equivalent terms as well with reference to district sewers as to joint district sewers, and the opinion involved in the case in hand is thus seen to be squarely in conflict with our decision in the Bambrick case, *supra*. This is true even upon the assumption that that decision rested upon the narrow ground that the tax bills there involved "were issued against parcels of ground," as is contended by counsel for respondents. But we cannot agree to that contention. The decision in the Bambrick case was put upon a much broader and more satisfactory foundation, as clearly appears from the following excerpt: "It will be noted in comparing the two provisions of the charter that the latter [Section 14] defining the word 'lot' and the sense in which it is to be used, does not purport in any way to define what shall be the significance of the phrase 'parcel

of ground.' Unless, therefore, appellants are able to show that the property affected by the tax bills in suit does not enclose the several 'parcels of ground' designated in the tax bills, there is no merit in their contention that the judgment in this case fixing a lien on these several parcels of ground violated the charter." [Bambrick Const. Co. v. Realty Co., 270 Mo. 1. c. 457.]

In the printed opinion the word "enclose" appears as "disclose," but that is obviously a mere typographical error. To use the word disclose in that connection makes the entire sentence meaningless, whereas to substitute "enclose" gives point and pertinency to the sentence and harmonizes it with the context.

The statement of facts above, quoted from respondents' opinion, shows that the plat of Semple Place was before the court, and that the plant subdivided "the land against which the said tax bills were issued, into lots described in said tax bills, the streets and alleys being designated thereon." "The property affected by the tax bills in suit," that is, the seven lots of Semple Place, is thus shown not only "to enclose the several 'parcels of ground' designated in the tax bills," as was said in the Bambrick case, but in fact to be identical with them, and there is hence no merit in the contention that the tax bills are invalid. Respondents' opinion upholding that contention does not follow our decision in the Bambrick case, where the contrary was held, as to the same property and on substantially the same facts.

In the case of Sheehan v. Owen, 82 Mo. 458, this court said, at page 465: "The work has been done by the plaintiff. No complaint is made that it was not done according to the contract, or that plaintiff is in any manner charged with notice of alleged irregularities in the proceedings of the council or the acts of the city officials, and while there may have been

**Substantial  
Compliance.**

some irregularities, the ordinances were substantially complied with by the city authorities and nothing done or omitted which could possibly have affected injuriously the interests of the defendant



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or other property holders, and we are not inclined to turn a plaintiff out of court who has given his time and expended his money in the improvement of their property on mere technicalities which in no manner affect the substantial rights or interest of the parties. If, in any material respect, the ordinances of the city bearing upon the questions involved had been disregarded by the city authorities or the plaintiff, his suit on his tax bill could not be maintained; but discovering no such disregard of the ordinances or any material error committed in the progress of the trial in the court below, the judgment is affirmed. All concur."

The principles stated in that opinion are sound and salutary, and when applied to the facts here involved, afford ready escape from the painful position in which the learned, able and conscientious jurists composing the St. Louis Court of Appeals conceived themselves to be when they felt bound in the same breath to affirm the decision and to denounce it as unjust. In the Bambrick case, we held the tax bills to have been issued in substantial compliance with the provisions of the charter, and therefore to be valid. In the Sheehan case, and in numerous others that might be cited, we have held substantial compliance with charter provisions in matters of this sort to be sufficient, and for very obvious reasons it is to the interest of all concerned, the property owner, as well as the contractor, that such compliance should be sufficient. [Gist v. Construction Co., 224, Mo. 369, l. c. 379.] Respondents' statement of facts taken from their opinion shows substantial compliance in the instant case. While we have the highest regard for respondents' ability and learning, as exemplified in the opinions of their court, we nevertheless believe that their opinion in the instant case is in conflict, in principle, with our decisions in both the Bambrick and the Sheehan cases, *supra*.

Another phase of this situation may well be considered. Concerning writs of *certiorari*, we have held as follows: "The divergence of opinion which will authorize this court to quash the opinion and judgment

of the Court of Appeals is a contrary holding upon a given 'question of law or equity.' Rulings upon a 'question of law' may be the same, although different states of fact may call for such rulings. In other words, as stated above, there may be a clear contrariety of opinion on a 'question of law or equity' without having two cases exact in history or facts—a 'grey mule' case is not required." [State ex rel. v. Reynolds, 265 Mo. 88, l. c. 93.]

Respondents, in construing Section 21 of Article VI of the St. Louis Charter, relating to sewer tax bills, which provides for the issuance of "a special tax bill against each lot in the district," hold void the seven tax bills issued in the instant case, on the ground that, under the facts stated, but one tax bill should have been issued against the entire tract. This holding is based on the principle of law that the whole proceeding, as respondents say, is "*in invitum* and rests exclusively upon a substantial adherence to the method prescribed by the ordinances authorizing the same, and of the charter as its basic power." Otherwise stated, respondents hold the language of Section 21, *supra*, providing for "a special tax bill against each lot in the district," to be mandatory, and not directory. Indeed, in their opinion on the motion for a rehearing, they so hold in express terms.

Section 24 of the same article of the Charter of St. Louis, provides, with reference to all special tax bills, that "in every such tax bill there shall be designated either the city treasurer, or . . . the name of some bank or trust company, to whom payment of such bill may be made." Certain tax bills were issued without conforming to that requirement of the charter, and the property owner contended that they were void for that reason. The property owner did in fact have notice of the place where the tax bill might be paid, although the tax bill itself did not convey that information. Concerning this contention, this court said: "The provision of Section 24 of Article 6 of the city charter requir-

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ing that the tax bill shall name the city treasurer or some bank or trust company doing business in the city to whom the payment shall be made is, in our opinion, purely directory. We can conceive no reason why such an omission should be considered fatal to this tax bill. . . . In this case, the owner had notice of the place of payment, which, though not the statutory designation of the place of payment, yet gave the owner the full benefit of the statutory requirement, and reduces the objection to a pure technicality. To declare the tax bill void on account of such omission would be equivalent to a confiscation of the work and material furnished by the plaintiff in the construction of the street." [Granite Bituminous Paving Co. v. McManus, 244 Mo. 184 l. c. 192-3]. The tax bills were accordingly held to be valid.

Like reasoning applies here with like force. In this instance the property owners were presented with seven slips of paper calling for an aggregate of \$5,750.61, as their part of the cost of building a sewer, and asserting a lien for that sum upon certain lands. It is undisputed that if that identical sum for that identical service had been demanded in one slip of paper, asserting an identical lien therefor upon those identical lands (plus the portion devoted to streets and alleys), there would be no defense to the claim. It is also undisputed that to sustain this contention is to confiscate the labor and material which went into the construction of this sewer. That contention is sustained reluctantly, under protest, and by force of supposed necessity, by respondents in their opinion in the case under consideration, upon the ground that the charter provision in question is mandatory. We think that the provision of the charter requiring the issuance of "a special tax bill against each lot in the district," in the absence, as here, of a showing of some loss of damage to the owner arising from a failure to observe the charter direction, is directory only; and that the principles announced in the McManus case, *supra*, apply with full force and are in conflict with the opinion here in question.

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State ex rel. Boatmen's Bank v. Reynolds.

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The very high esteem in which we hold the judicial utterances of respondents has led us to examine, with studious care, all of the cases cited by them in their opinion now under review, as well as those cited by counsel in the brief filed in respondents' behalf, and in the brief analysis which follows we point out the reasons why we regard them as inconclusive.

Kansas City Milling Co. v. Riley, 133 Mo. 574; Granite Bituminous Paving Co. v. McManus, 244 Mo. 184; McShane v. City of Moberly, 79 Mo. 41; Funkhouser v. Lay, 78 Mo. 458; Landis v. Hamilton, 77 Mo. 554, and Brinck v. Collier, 56 Mo. 160, are cited in support of the argument that there was no dedication of the streets and alleys of Semple Place to public use. We do not think it necessary that there should have been any such dedication in order to give validity to the tax bills here in suit, and so further discussion of that point may be waived.

Barber Asphalt Paving Co. v. Munn, 185 Mo. 552, and Sheehan v. Owen, 82 Mo. 458, are cited to the point that the right of the city to create a lien upon an abutting property-owner for street and sewer improvements is, in the language of respondents' opinion, "*in invitum* and rests exclusively on a substantial adherence to the method prescribed by the ordinance authorizing the same, and of the charter as its basic power." To this doctrine we assent. We find in it nothing to conflict with the views expressed by us in this opinion. On the contrary, these cases support the doctrine of substantial performance. All other cases cited in respondents' opinion relate to points not touching upon the validity of these tax bills, and for that reason they need not be discussed.

Counsel for respondents cite all of the cases cited in respondents' opinion, and State ex rel. Peters v. Reynolds, 214 S. W. 121, and Prior v. Construction Co., 170 Mo. 439, in addition. State ex rel. Peters v. Reynolds, is cited to the same point to which we have cited it in this opinion, and about which we quite agree

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with respondents' counsel, while *Prior v. Construction Co.* is cited only in support of counsel's statement that joint district sewers and district sewers are different things. They are, but that fact in no wise affects the questions in issue here.

For the reasons stated, the record in the case of *Boatmen's Bank v. Semple Place Realty Company et al.*, now before us, should be quashed. It is so ordered. All concur.

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### EX PARTE LOUIS LERNER

In Banc, January 26, 1920.

1. **HABEAS CORPUS: Constitutionality of Law.** If a person is deprived of his liberty for any act not in contravention of an existing law, or if the act or ordinance under which he is held is unconstitutional, whether the offense denounced by it is classified as a misdemeanor or a felony, *habeas corpus* is available to restore him to his freedom.
2. **POWER OF CITY: Use of Streets.** The charter powers of the City of St. Louis to establish, locate, dedicate and supervise the highways of the city, and "to do all things whatsoever expedient for promoting the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufacture of the city or its inhabitants," having their origin in the police powers of the State, are ample to authorize the city by legislative enactment, not only to establish and improve its streets, but to prescribe the terms and conditions upon which they may be used, subject only to the Constitution and laws of the State.
3. ———: ———: **Validity of Ordinance: Test Rule.** The validity of an ordinance enacted by the City of St. Louis in pursuance to its charter powers is to be tested by the rules of interpretation applicable to state legislative enactments.
4. ———: ———: **Violation of Ordinance: Civil or Criminal Proceeding.** While a prosecution for a violation of a city ordinance regulating the use of streets is technically a civil proceeding, yet in so far as it authorizes the imposition of a penalty upon conviction it partakes of the nature of a criminal action, and the validity of the ordinance is subject to the same rules of construction as is a criminal statute.

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5. ———: ———: **Validity of Ordinance: Special Classes.** An ordinance regulating the use of streets, to be valid, must be general in its terms and uniform in its application to the class of persons or subjects to be affected. If it seeks to regulate citizens in the otherwise lawful use of their property or the conduct of their business, the rules and conditions by it required to be observed must be so specified that all citizens may alike be required to comply with them.
6. ———: ———: ———: ———: **Soliciting Business.** An ordinance which seeks to punish any person who shall accost another on a street in front of any store and solicit such person to purchase, at another store, goods, wares or merchandise of like nature as those kept in such store, is invalid, since it does not apply to all persons or streets alike, but is special in its terms and local in its application, and contravenes the constitutional provision that "where a general law can be made applicable, no local or special law shall be enacted."
7. ———: ———: **Police Power: Public Welfare: Subject to Constitutional Inhibition.** A city cannot enact a police regulation which contravenes either the Constitution or a statute enacted by the Legislature. An ordinance enacted in the exercise of the police power must be general in its nature and applicable alike to all persons who may properly come within its purview. It is not sufficient that its enforcement would promote the general welfare, for instance, that it would facilitate the public use of streets; but, to avoid constitutional inhibition, it must be general in its terms and uniform in its application.

### *Habeas Corpus.*

PETITIONER DISCHARGED.

*Frumberg & Russell* for petitioner.

(1) The ordinance cannot be upheld as a valid exercise of the police power. 3 McQuillin, on Mun. Corp. sec. 893, p. 1895; *Chicago v. Netcher*, 183 Ill. 104; *State ex rel. v. Ashbrook*, 154 Mo. 375; *State v. Julow*, 129 Mo. 163; *Pinkerton v. Verberg*, 78 Mich. 573. (2) Nor can it be upheld as an exercise of the power to regulate the use of the streets. *State ex rel. v. Murphy*, 134 Mo. 548; *St. Louis v. Gloner*, 210 Mo. 502.

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*Charles H. Daues and E. Paul Griffin* for respondent.

(1) The City of St. Louis has the power, under the provisions of its charter, to regulate the use of its streets and sidewalks, to license and regulate all persons engaged in any business or occupation, to prohibit altogether or to license and regulate all practices or occupations detrimental or liable to be detrimental to the comfort, safety, convenience or welfare of the people and all nuisances, to prescribe limits within which occupations or practices liable to be nuisances or detrimental to the security or general welfare of the people may be conducted, and to do all things expedient for promoting the comfort, peace, government, welfare, trade, or commerce of the city or its inhabitants. Charter of the City of St. Louis, clauses 14, 23, 25, 26, 33, art. 1, sec. 1. (2) The Board of Aldermen is *prima facie* the sole judge of an ordinance, and hence the legal presumption is in favor of the validity of same, unless the contrary appears on the face of the ordinance or is established by proper evidence. *Morse v. Westport*, 110 Mo. 509; *McQuillin*, Mun. Ord. pp. 298-299; *St. Louis v. United Railways Co.*, 263 Mo. 456. (3) All rights of every character whatsoever are held subject to the police power. *St. Louis v. McCann*, 158 Mo. 301; *St. Louis v. Galt*, 179 Mo. 168; *Gundling v. Chicago*, 177 U. S. 188; *St. Louis v. Western Union*, 149 U. S. 469; *St. Louis Poster Adv. Co. v. St. Louis*, 249 U. S. 269; *St. Louis Gunning Adv. Co. v. St. Louis*, 235 Mo. 99; *Schenk v. United States*, 249 U. S. 47; *Frohwerk v. United States*, 249 U. S. 46. (4) Ordinances similar to this one have been upheld, such as regulating hotel runners and drummers, hawking and peddling on streets, prohibiting persons from selling theatre tickets in front of theatres. 3 *McQuillin* on Mun. Corp. sec. 924; *Chillicothe v. Brown*, 38 Mo. App. 609, cited in 263 Mo. 457; *People ex rel. Lange v. Palmutter*, 128 N. Y. Supp. 426; *In re Barmore*, 163 Pac. 50; *Williams v. State*, 217 U. S. 79.

WALKER, C. J. —The writ of *habeas corpus* issued herein was directed to the Marshal of the City of St.

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Louis, commanding him to have the body of the petitioner before this court to be dealt with as might be determined. The production of the body of the petitioner being waived, the return of the respondent, the Marshal, discloses that he holds the petitioner to answer a charge of having violated an ordinance of the City of Saint Louis which is alleged by the petitioner to be invalid. The body of said ordinance, with which we are alone concerned, is as follows:

“Any person who shall accost another person on a street or sidewalk in front of any store, house or place of business in the City of St. Louis, and solicit such other person to purchase any goods, wares or merchandise of a like nature as those kept for sale within said store, house or place of business at another store, house, or place of business, or shall solicit such other person to enter such other store, house, or place of business, for the purpose of examining or purchasing similar goods, wares, or merchandise, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars nor more than one hundred dollars. Provided, however, that nothing herein shall be construed as prohibiting licensed peddlers acting within the scope of their license, nor members of bona-fide organizations doing lawful picket duty, nor as prohibiting anyone, whether as principal or agent, from soliciting trade upon the street or sidewalk in front of his own place of business.” [Ordinance 30332, approved April 11, 1919.]

I. It was formerly ruled by this court that one held under process issued by a court having jurisdiction of the person and the offense, and where the person was in the custody of the proper officer, *habeas corpus* would not lie to test the constitutionality of the law under which the restraint was claimed to be authorized. This limitation upon the court's action first found expression in the early case *In re Harris*, 47 Mo. 164, which was affirmed in *Ex parte Boenninghausen*, 91 Mo. 301. The latter ruling, how-

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ever, overlooked an earlier case in the same volume, of Ex parte Marmaduke, 91 Mo. 228, which held that the court was not so limited in *habeas corpus* proceedings, and which overruled without reference thereto the Harris case. In Ex parte Smith, 135 Mo. 223, the rule as declared in the Marmaduke case was expressly approved and has since been uniformly followed. [In re Flukes, 157 Mo. l. c. 127; Ex parte Neet, 157 Mo. l. c. 533 and cases cited; Ex parte Lucas, 160 Mo. 218.] A cogent reason for this later ruling rests in the fact that an unconstitutional law is no law and its validity is therefore open to attack as determinative of the question of jurisdiction at any stage of a proceeding, even in a criminal case after conviction and judgment, the controlling requisite in the application of the rule being that the record disclose that the petitioner is illegally restrained of his liberty regardless of the stage of the proceedings or nature of the charge, although it may be but a misdemeanor punishable only by a fine. See the Smith, Neet and Lucas cases, *supra*, and others in which the restraint was upon charges for misdemeanors punishable as stated. The rule therefore may be regarded as settled in this jurisdiction that if a person is deprived of his liberty for any act not in contravention of an existing law, or if the act under which he is held is unconstitutional, *habeas corpus* is the proper remedy to restore to him his freedom. (Ex parte Neet, *supra*, and cases cited.)

II. The propriety of the proceeding having been established, the sole question seeking solution is the validity of the ordinance. The city charter, which constitutes the immediate source of municipal legislative power, is in this regard comprehensive in its terms. It is not deemed necessary to set these out in detail, reference thereto being sufficient. [See CLAUSES 14, 23, 25, 26 of Article 1, Section 1, Charter, City of St. Louis.] To these more specific powers which include the right to establish, locate, dedicate and

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supervise the highways of said city is added the following general provision :

“To do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufactures of the city or its inhabitants.” [Sec. 33, art. 1, sec. 1.]

These provisions, which have their origin in the police power of the State (State ex inf. *Barker v. Merchants Exchange*, 269 Mo. 346), are ample to authorize the city by legislative enactment not only to establish and improve its streets but to prescribe the terms and conditions upon which they may be used (State ex rel. *Subway Co. v. St. Louis*, 145 Mo. l. c. 570; *St. Louis v. W. U. Tel. Co.*, 149 U. S. 467), subject only to the Constitution and the laws of the State (Sec. 23, Art. 9, Mo. Constitution).

III. The general power to enact an ordinance of the character here under review having been determined, its validity is to be tested by the rules of interpretation applicable to state legislative enactments. [*St. Louis v. Const. Co.*, 244 Mo. l. c. 488; *Carroll v. Campbell*, 110 Mo. 557; *Holman v. City of Macon*, 155 Mo. App. l. c. 402.]

A prosecution for a violation of the ordinance in question, while technically a civil proceeding (*Kansas City v. Neal*, 122 Mo. 234; *City of St. Louis v. Vert*, 84 Mo. 204; *City of St. Louis v. Schoenbusch*, 95 Mo. 618; *Parte Hollwedell*, 74 Mo. 395; *City of St. Louis v. Knox*, 74 Mo. 79; *Kansas City v. Clark*, 68 Mo. 588), will, upon a conviction, authorize the imposition of a penalty and in thus far it partakes of the nature of a criminal action and the ordinance on which it is based is subject to the same rules of construction as a criminal statute, for it is not to be presumed that the State has delegated to a municipal assembly a greater right or conferred upon its acts a more liberal rule of interpretation than is applied to its own

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legislative enactments. [Hays v. Poplar Bluff, 263 Mo. 516; Chicago etc. v. Salem, 156 Ind. 71; Zorger v. Greensburgh, 60 Ind. 1; Gates & Co. v. Richmond, 103 Va. 702.] Hence penal ordinances, like penal statutes, are to be strictly construed. [City of St. Louis v. Robinson, 135 Mo. l. c. 470; St. Louis v. Goebel, 32 Mo. 295; United States v. Hartwell, 6 Wall. 396.] This rule is to be applied when the purpose of construction is to relieve one charged with a violation of such an ordinance, a liberal construction being permissible otherwise to maintain its validity. [Swift v. Topeka, 43 Kan. 671, 8 L. R. A. 772.] Without reference in detail to the requisites of a valid criminal statute, it will suffice to say that an ordinance, to conform to same, must be general in its terms and uniform in its application to the class of persons or subjects to be affected. If the ordinance, therefore, seeks to regulate citizens in the otherwise lawful use of their property or the conduct of their business, the rules and conditions therein required to be observed must be so specified that all of the citizens may alike be required to comply with same; and no opportunity must be afforded by the terms of the ordinance for the exercise of discrimination between citizens so complying. [St. Louis v. Const. Co., 244 Mo. l. c. 489.] An analysis of the ordinance will enable it to be determined whether it possesses the infirmity indicated. Instead of prohibiting the general personal solicitation of persons for business purposes upon the streets and sidewalks of the city, its application is limited to the prohibition of such solicitations to persons in like lines of trade in front of the store or place of business of a competitor. Such a classification is neither general in its terms as to the persons to whom it is intended to apply or to the streets the use of which is attempted to be regulated.

Certainly if it be an ill requiring legislative supervision to regulate the solicitation of business upon the streets and highways within the limits prescribed in the ordinance, then it must follow that it is equally an ill

to solicit business elsewhere upon any of the thoroughfares of commercial activity in the city. The ordinance, therefore, cannot be otherwise construed than as special in its terms and local in its application, contravening the constitutional provision that "where a general law can be made applicable, no local or special law shall be enacted" (Sec. 32, art. 4, Con. Mo.), which salutary rule regulating legislation we have shown applies with equal force to an ordinance as well as a state law (*St. Louis v. Const. Co.*, 244 Mo. l. c. 488).

IV. The authority primarily for the enactment of ordinances of the character here under review must arise from the exercise of the police power. This power, as we have before indicated, exists in the State and is held to be delegated to municipal corporations to be exercised in the preservation of the health, safety, welfare and comfort of the citizens. While this classification may be extended by the more general one that whatever is contrary to public policy or is inimical to the public interest is subject to the police power (*State v. Smith*, 233 Mo. 242, 33 L. R. A. (N. S.) 179; *Silva v. Newport*, 150 Ky. 781, 34 Ann. Cas. 1914D, 613); and whether the ordinance is calculated to promote the object of its enactment or not, is one with which we have no concern if the municipal legislative will has been clearly expressed (*State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Crowley v. Christensen*, 137 U. S. 86, 34 Law Ed. 620; *Ex parte Hayes*, 98 Cal. 555, 20 L. R. A. 701; *Comm. v. Reinecke Coal Co.*, 117 Ky. 885), conformity to constitutional and statutory requirements is as necessary to the validity of ordinances of this character as others. More briefly put, a municipality cannot authorize that which either the organic law or the Legislature has forbidden. Under our system of jurisprudence, therefore, an ordinance enacted in the alleged or ostensible exercise of any of the well-defined purposes of the police power must be general in its nature and applicable alike to all who may properly come within its purview.

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If, as is probable from its terms, the purpose of the enactment of the ordinance was upon the assumption that its enforcement would promote the welfare and add to the comfort of the public by affording more facilities for the use of the streets, then to avoid the constitutional inhibition it should have been general in its terms and uniform in its application; lacking these requisites its invalidity inheres despite the purpose of its enactment and will not stand the test of judicial construction. [Merchants Exchange v. Knott, 212 Mo. 616; Hewlett v. Camp, 115 Ala. 499; Flood v. State, 19 Tex. App. 584; Bohmy v. State, 21 Tex. App. 597.]

The invalidity of the ordinance having been determined and the right to enact one not burdened with the infirmities of that at bar being conceded, it becomes unnecessary to discuss whether personal liberty would be impaired by the enactment of a general ordinance; my individual opinion is that it would not.

In view of all of the foregoing the petitioner should be discharged and it is so ordered. All concur; *Blair, Williams and Goode, JJ.*, in result; *Woodson, J.*, absent.

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CITY OF ST. LOUIS, Trustee Under Will of BRYAN MULLANPHY, v. FRANK W. McALLISTER, Attorney-General, and CHAMBERS SMITH et al., Interveners, Appellants.

In Banc, January 26, 1920.

1. **TRUST FUND: Failure of Objects: Cy Pres Doctrine.** Whether or not there has been a failure or a partial failure of the definite charitable objects for which a trust fund was created is a question of fact to be determined by evidence; and unless the evidence shows with reasonable certainty that there will be a permanent failure of at least a substantial portion of the objects of the trust, the question of further administration and disposition of the fund does not arise, nor can questions of what might be done with the fund were there a failure of the charitable objects be considered.

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2. ———: **Reinvestment.** The power of a court of equity to authorize the alienation of property belonging to a charitable trust should be exercised with caution, and should not be exercised at all unless it clearly appears that the proposed alienation would be for the benefit of the charity. So that where the trust fund consists of many tracts of real estate, and the estimates of the price at which it could be sold are one-half its value, and there is no evidence that if sold and the proceeds invested in Government or State bonds the income would amount to as large a net return as is now realized, a decree ordering all the real estate sold and the proceeds invested in bonds should not be rendered.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings, Judge.*

REVERSED AND REMANDED (*with directions*).

*Frank W. McAllister*, Attorney-General, and *S. E. Skelley*, Assistant Attorney-General, for appellant.

(1) The judgment and decree of the court is against the evidence and weight of the evidence. (2) The court erred in its fourth finding of fact that expenditures out of proportion to benefits conferred have been and are necessary because of the poor location and dilapidated condition of the real estate belonging to the fund. (3) The total net income of the trust estate can be applied for the specific purposes designated by the testator. (4) The case made by plaintiff does not sustain the judgment and decree of the court, diverting a portion of the income of the trust estate *cy pres*. (a) The *cy pres* doctrine is one of judicial construction, invoked in order to effectuate the paramount purpose of the founder. 11 C. J. 360; 2 Perry on Trusts and Trustees (6 Ed.), sec. 728; Mo. Historical Society v. Academy of Science, 94 Mo. 467; Crow ex rel. v. Clay County, 196 Mo. 279; Catron v. Scarritt, 264 Mo. 713. (b) The *cy pres* doctrine is a rule of limitation and in applying same, the court, in the exercise of its equity powers and jurisdiction, can give effect only to the express charitable purposes and intent of the donor, as disclosed by the instrument presented for construction. Crow ex rel. v. Clay County, 196

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Mo. 272, 278; Jackson v. Phillips, 14 Allen (Mass.) 591. (c) It is a prerequisite to the application of the doctrine that the court discover a general charitable intent. 11 C. J. 361; Quimby v. Quimby, 175 Ill. App. 372; Allen v. Trustees Nasson's Institute, 107 Me. 120; Bragg v. Litchfield, 212 Mass. 148; Teele v. Bishop of Derby, 168 Mass. 341; Richardson v. Mullery, 200 Mass. 545; Mason v. Library Assn., 237 Ill. 442; Nichols v. Newark Hospital, 77 N. J. Eq. 130. (d) A court of equity may vary the details of administration to effectuate the paramount purpose of the founder, but will not alter the charity itself, or substitute another for it. Lackland v. Walker, 151 Mo. 248; Crow ex rel. v. Clay County, 196 Mo. 279; Hadley v. Forsee, 203 Mo. 428; Catron v. Scarritt, 264 Mo. 729. (e) The decree of the court that the income from the trust fund, beyond what may be necessary to properly provide for the persons designated by the testator, shall be used for the purpose of furnishing relief, information, advice and assistance, to worthy emigrants and travelers, generally, in the City of St. Louis, in need and distress, preference at all times to be given to men with families, and women and children coming within the designation aforesaid, alters the scheme of the charity of the founder; in effect established a new charity and exceeds the jurisdiction and power of the court. Crow ex rel. v. Clay County, 196 Mo. 279; Jackson v. Phillips, 14 Allen (Mass.) 591. (f) There can be no application of the American doctrine of the *cy pres* until there has been an entire failure of the object of the charity according to the original interpretation of the intention of the founder, or until it appears impossible to carry out the scheme according to its terms. Crow ex rel. v. Clay County, 196 Mo. 264; Winthrop v. Attorney-General, 128 Mass. 258; Greene v. Blackwell, 35 Atl. (N. J.) 375; Philpott v. St. George's Hospital, 27 Beav. 127. Whether the intention of the founder as originally construed has failed is a question of fact. Women's Christian Assn. v. Kansas City, 147 Mo. 127. The evidence in this case is insufficient to sustain the finding of the court that the object of

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the charity has failed by reason of a cessation of emigration. (5) The decree of the court that the parcels of land described in relator's petition be sold and the proceeds be reinvested in bonds is contrary to the evidence, uncalled for, and unjustified under any view of the situation at this time and opposed to the best interests of the trust estate. (a) Whether inherent or statutory, the power of the court to alienate the lands of a charitable trust is properly exercised only when changed conditions and circumstances make such alteration essential to the beneficial administration of the charity. 11 C. J. 353; 5 R. C. L. 363; *Smith v. Smith*, 118 N. C. 735; *Johnson v. Buch*, 220 Ill. 226; *Grace Church v. Ange*, 161 N. C. 314; *Jones v. Habersham*, 107 U. S. 183; *Lackland v. Walker* 151 Mo. 269. (b) No principle obtains justifying the sale of lands dedicated to a charitable use at the mere discretion of the court or upon the sole ground that it appears to be advantageous to the estate. *Lackland v. Walker*, 151 Mo. 268; *Crow ex rel. v. Clay County*, 196 Mo. 265; *Women's Christian Assn. v. Campbell*, 147 Mo. 122. (c) The evidence in this case does not show such change of conditions and circumstances as to render a sale of the lands belonging to the trust estate essential to the beneficial administration of the charity. *Women's Christian Assn. v. Campbell*, 147 Mo. 103; *Lackland v. Walker*, 151 Mo. 210. (6) Lands or other property once having vested in a trustee for charitable purposes cannot be reclaimed by the donor or his heirs. (a) The rule is settled and thoroughly established that where lands have been donated and become vested in a trustee for charitable uses, neither the donor, nor his heirs can ever reclaim them. 11 C. J. 371; *Acad. of the Visitation v. Clemens*, 50 Mo. 171; *Women's Christian Assn. v. Kansas City*, 147 Mo. 126; *Lackland v. Walker*, 151 Mo. 242; *Crow ex rel. v. Clay County*, 196 Mo. 261; *Mount v. Morris*, 249 Mo. 147; *Sandusky v. Sandusky*, 265 Mo. 234; *Jackson v. Phillips*, 14 Allen (Mass.) 647. (b) Where the particular object of the charitable bequest is in existence at the testator's death,



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but ceases to exist at a subsequent time the legacy does not lapse, but the fund having once vested in the charity may be applied *cy pres* by the court. 11 C. J. 363; *Mason v. Lbr. Assn.*, 237 Ill. 442; *Hubbard v. Worcester Art. Museum*, 194 Mass. 280; *Nichols v. Newark Hospital*, 71 N. J. Eq. 130. (c) When an estate is devoted to a charitable purpose and the income of the estate subsequently increases, so that it is in excess of the requirements of the charity, there will be no resulting trust in favor of the heirs-at-law of the donor, but the entire revenue will be devoted to the object of the charity. *Beach on Trusts and Trustees*, sec. 329.

*Morton Jourdan* and *Lee W. Hagerman* for appellant-interveners.

(1) The court erred in the first clause of its judgment and decree in finding that the interveners had no right, title or interest in any of the property, real, personal or mixed, which Bryan Mullanphy gave to the City of St. Louis in trust. (2) Where there is a failure or partial failure of the purposes, uses and objects of the trust so that the trust cannot be carried out, and the performance of it according to the terms of the declaration of trust is impossible, a resulting and constructive trust in favor of the heirs will be decreed. *James v. Allen*, 3 Mer. 17; *Ommaney v. Butcher, T. & R.* 260; *Fowler v. Garlike*, 1 Russ. & M. 232; *Williams v. Kershaw*, 5 Cl. & F. 111; *Harris v. Du Pasquier*, 26 L. T. Rep. 289; *Leavers v. Clayton*, 8 Ch. D. 589; *Adye v. Smith*, 44 Conn. 60; *Chamberlain v. Stearns*, 111 Mass. 267; *Nichols v. Allen*, 130 Mass. 211; *Carrick v. Errington*, 2 Pere Williams, 361; *Collins v. Wakeman*, 2 Ves. Jr. 683; *Fitch v. Weber*, 6 Hare, 145; *Flint v. Warren*, 16 Sim. 124; *Atty-Gen. v. Dean*, 24 Beav. 679, 8 H. L. 369; *Roper v. Radcliff*, 9 Mod. 171; *Hopkins v. Hopkins*, 1 Atk. 581, 597; *Arnold v. Chapman*, 1 Ves. 108; *Page v. Leapingwell*, 18 Ves. 463; *Tregonwell v. Sydenham*, 3 Dow. 194; *Jones v. Mitchell*, 1 S. & S. 290; *Pilkington v. Boughey*, 12 Sims. 114; *Turner v. Russell*, 10 Hare, 204; *Morris v. Owen*, W. N. (1875),

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134; Huchaby v. Jones, 2 Hawks, 120; Stevens v. Ely, 1 Dev. Eq. 493; Sorrey v. Bright, 1 Dev. & B. Eq. 113; Thompson v. Newlin, 3 Ired. Eq. 338; Lemmond v. Peoples, 6 Ired. Eq. 137. (3) The law of private trusts is that where there is a surplus, residue or balance, over and above the amount necessary to satisfy the purposes, uses and objects of the trust, a resulting and constructive trust will be decreed in favor of the heirs or next of kin. Ellcock v. Mapp (England, 1851), 3 House of Lords Cases, 492; Cooke v. Guavas, 9 Mod. 187; Culpepper v. Aston, 2 Ch. Ca. 115; Levet v. Needham, 2 Vern. 138; Randall v. Bookey, 2 Vern. 425; City of London v. Garway, 2 Vern. 571; Countess of Bristol v. Hungerford, 2 Vern. 645; Starkey v. Brooks, 1 P. Wms. 390; Kiercke v. Branshey, 2 Eq. Ab. 508, pl. 5; Robinson v. Taylor, 1 Ves. Jr. 44, 2 Bro. C. C. 588; Dean v. Dalton, 2 Bro. C. C. 634; Habbergham v. Vincent, 2 Ves. Jr. 204; Halliday v. Hudson, 3 Ves. Jr. 210; White v. Evans, 4 Ves. 21; Mordaunt v. Hussey, 4 Ves. 117; Seyel v. Wood, 10 Ves. 75; Nash v. Smith, 17 Ves. 29; Landham v. Sanford, 17 Ves. 442, 19 Ves. 643; Southouse v. Bate, 2 V. & B. 396; Kellett v. Kellett, 3 Dow. 248; Girard v. Hanbury, 3 Mer. 150; Wollett v. Harris, 5 Mad. 452; Rhodes v. Rudge, 1 Sim. 79; Braddon v. Farrand, 4 Russ. 87; Harris v. Harris, 2 Keen, 646; Muller v. Bowman, 1 Coll. 197; Andrew v. Andrew, 1 Coll. 686; Love v. Gaze, 8 Beav. 472; Meryon v. Collett, 8 Beav. 386; Sanderson's Trust, 3 K. & J. 497; Saltmarch v. Barrett, 3 De G., F. & J. 279, 29 Beav. 474; Barrs v. Fewkes, 2 Hem. & M. 60; Hall v. Waterhouse, W. N. (1867) 11; Bird v. Harris, L. R. 9 Eq. 204; Selter v. Cavanaugh, 1 Dr. & Walsh, 668; Neale v. Hagthorp, 3 Bland, 551; Skellinger v. Skellinger, 3 N. J. L. J. 179. (4) In cases of charitable trusts, when the *cy pres* doctrine is not applicable, where there is a failure or partial failure of the purposes, uses and objects of a charitable trust, or, where there is a surplus, residuum or balance over and above the amount necessary to satisfy and execute the purposes, uses and objects of a charitable trust, a resulting and constructive trust will be decreed

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in favor of the heirs or next of kin or the representative of the donor. *Morris v. Bishop of Durham*, 9 Vesey, 399, 10 Vesey, 521; *Owens v. Missionary Society*, 14 N. Y. 380; *Downing v. Marshall*, 23 N. Y. 366; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 N. Y. 584; *Adams v. Perry*, 43 N. Y. 487; *White v. Howard*, 46 N. Y. 144; *Holmes v. Mead*, 52 N. Y. 322; *Prichard v. Thompson*, 95 N. Y. 76; *Cottmar v. Grace*, 112 N. Y. 299; *Read v. Williams*, 125 N. Y. 560; *Fosdick v. Hempstead*, 125 N. Y. 581; *Tilden v. Green*, 28 N. E. 880; *Walsh v. Secretary of State for India*, 10 H. L. Cas. 367 (England 1863); *Marsh v. Means*, 3 Jur. N. S. 790 (Eng. 1857); *Longford v. Gowland*, 3 Clifford, 617 (Eng. 1862); *Broadbent v. Barrow*, 29 Ch. Dis. 560 (Eng. 1853); *Chapman v. Brown*, 6 Vesey, 404 (Eng. 1801); *Yates v. University College*, L. R. 7 H. L. 438; *Hopkins v. Ellis*, 10 Beav. 169; *Atty.-Gen. v. Lord Weymouth*, Ambler 19 (Eng. 1743). *Henshman v. Atty.-Gen.*, 3 My. & K. 493 (Eng. 1836); *West v. Shuttleworth*, 2 Myln & Keen, 684; *Attorney-General v. Pyle*, 1 Atkins, 435; *Adams on Equity* (5 Am. Ed.) sec. 71; *Story on Eq. Jurispr.* (11 Ed.), sec. 1182, p. 489; *Maught v. Getzendamer*, 65 Md. 332; *Salyor v. Plaine*, 31 Md. 158; *Nichols v. Allen*, 130 Mass. 211; *Fifield v. Van Wyck*, 94 Va. 557; *Columbian University v. Taylor*, 25 App. D. C. 124; *Adage v. Smith*, 44 Conn. 60; *Hopkins v. Grimshaw*, 165 U. S. 342; *Miller v. Riddle*, 227 Ill. 53; *People v. Braucher*, 258 Ill. 604; *Brooks v. Belfast*, 90 Me. 318; *Quinby v. Quinby*, 175 Ill. App. 367; *Stratton v. Medical College*, 149 Mass. 505; *Bullard v. Sherley*, 12 L. R. A. 110; *Easterbrook v. Tillinghast*, 3 Gray (Mass.) 17; *Pringle v. Dorsey*, 3 S. C. 502; *Grundy v. Neal*, 147 Ky. 729; *Cone v. Wold*, 85 Minn. 302.

*Charles H. Daues & E. Paul Griffin* for respondent.

(1) The charitable trust created by the will of Bryan Mullanphy was a valid one with a competent trustee and

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beneficiaries who were in existence at the time of his death, and the trust actually vested in the trustee for the benefit of the beneficiaries indicated in the will after the death of Bryan Mullanphy. *Chambers v. City of St. Louis*, 29 Mo. 543; *Robinson et al. v. Crutcher*, 209 S. W. 104. (2) The collateral heirs at law of Bryan Mullanphy have no right, title or interest in said fund. The rule is well settled in this State that where lands have been donated and become vested in a trustee for charitable uses, neither the donor nor his heirs can ever reclaim them. 11 C. J. 371; *Acad. of the Visitation v. Clemens*, 50 Mo. 167, 171; *Women's Christian Assn. v. Kansas City*, 147 Mo. 126; *Lackland v. Walker*, 151 Mo. 242; *Crow ex rel. v. Clay County*, 196 Mo. 261; *Mount v. Morris*, 249 Mo. 147; *Sandusky v. Sandusky*, 265 Mo. 234; *Jackson v. Phillips*, 14 Allen (Mass.) 647; *Hand v. St. Louis*, 158 Mo. 204. Where the particular object of the charitable bequest is in existence at the testator's death, but ceases to exist at a subsequent time, the legacy does not lapse, but the fund having once vested in the charity may be applied *cy pres* by the court. 11 C. J. 363; *Mason v. Bloomington Lbr. Assn.*, 237 Ill. 442; *Hubbard v. Worcester Art Museum*, 194 Mass. 280; *Nichols v. Newark Hospital*, 71 N. J. Eq. 130. (3) The *cy pres* doctrine is universally recognized in Missouri. The Supreme Court of this State has many times so declared. The plan which the circuit court decreed of broadening and enlarging the charity of Bryan Mullanphy in this case was a proper one under the evidence. *Chambers v. City of St. Louis*, 29 Mo. 543; *Academy of the Visitation v. Clemens*, 50 Mo. 167; *Goode v. McPherson*, 51 Mo. 126; *Howe v. Wilson*, 91 Mo. 45; *Missouri Historical Society v. Academy of Science*, 94 Mo. 459; *Powell v. Hatch*, 100 Mo. 592; *Barkley v. Donnelly*, 112 Mo. 561; *Sappington v. School Fund Trustees*, 123 Mo. 32; *Lackland v. Walker*, 151 Mo. 210; *Crow ex rel. v. Clay County*, 196 Mo. 234; *Mott v. Morris*, 249 Mo. 137; *Catron v. Scarritt Collegiate Institute*, 264 Mo. 713; *Hand v. St. Louis*, 158 Mo. 204. The *cy pres* doctrine

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is recognized in other States and by the Supreme Court of the United States. *Jackson v. Phillips*, 14 Allen, 571; *American Academy of Science v. Harvard College*, 12 Gray, 582; *Russell v. Allen*, 107 U. S. 163; *Church of Latter Day Saints v. United States*, 136 U. S. 1, 140 U. S. 665; *Bispham's Prin. of Eq.* (9 Ed.) secs. 128-130, pp. 221-226; *Camp v. Presbyterian Society*, 173 N. Y. S. 581; *Minot v. Baker*, 147 Mass. 348. The *cy pres* doctrine has always existed and has always been recognized in England. *Moggridge v. Trackwell*, 7 Vesey, 36; *Bispham's Principles of Equity* (9 Ed.), sec. 128, p. 221; 5 Am. & Eng. Ency. Law (2 Ed.), p. 937; *Pomeroy Eq. Jur.* 1523, sec. 1027; *Ommanney v. Butcher*, Turn. & Russ. 279; *Attorney-General v. Hicks*, 3 Brown C. C. 166; *Attorney-General v. Ironmongers*, 2 Beav. 313. (4) It was eminently proper for the court, under the evidence, to decree the sale of the real estate and provide for the investment of the proceeds in bonds. *Lackland v. Walker*, 151 Mo. 210.

WILLIAMS, J.—This is a suit in equity originally instituted in December, 1916, in the Circuit Court of the City of St. Louis.

This suit was instituted by the City of St. Louis, trustee under the will of Bryan Mullanphy, deceased, as plaintiff, against the Attorney-General of Missouri (as the representative of the general public in matters appertaining to the administration of public charities) as defendant.

The purpose of the suit, as disclosed by the pleadings, was to have a court of equity apply the *cy pres* doctrine to the administration of the trust fund provided by said will and to have the court authorize a sale of all the real estate belonging to said trust fund and that the proceeds from such sales be re-invested in high class securities.

After the suit was instituted certain collateral kindred of the testator, by leave of court, filed a petition as interveners. This petition in substance states that

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the objects for which the charity was originally created have failed, and prayed that the court decree a resulting or constructive trust in said property in favor of the heirs of said testator.

Trial in the circuit court resulted in a decree in favor of the plaintiff and thereupon the defendant and the interveners duly perfected an appeal.

The will by which the trust fund in question was originally created was as follows:

"I, Bryan Mullanphy, do make and declare the following to be my last will and testament.

"One equal undivided third of all my property, real personal and mixed, I leave to the City of St. Louis in the State of Missouri, in trust to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis, on their way bona fide to settle in the West. I do appoint Felix Coste and Peter G. Camden Executors of this my last will and testament, and of any other will or executory devise that I may leave. All and any such document will be found to be olograph, all in my own handwriting. In testimony whereof witness my hand and seal.

"BRYAN MULLANPHY (Seal)

"Witnesses who have all signed in the presence of the testator and each other, and saw the testator sign in the presence of them and each of them.

"ADOLPHUS WISTIZENUS,

"JOHN WOLFE,

"W. M. WARNE,

"C. AUGUST SCHABEL."

Some of the witnesses estimate the present value of said trust estate to be about one million dollars.

We have read the large record in this case and find that a fair summary of the facts is found in the statement made in the brief of the learned Attorney-General. In fact, the statement of facts made by respondent is practically the same as that made by the defendant.

From the statement of facts contained in the brief filed by the Attorney-General, as appellant, we quote as follows:

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"The plaintiff introduced in substance and briefly stated the following evidence, material to the issues involved:

"By the will of Bryan Mullanphy, a wealthy and eccentric bachelor living in St. Louis, executed in 1849 and duly probated in 1851 in the Probate Court of the City of St. Louis, real estate to the value of approximately \$500,000, consisting of about ninety parcels, was left to the City of St. Louis, as trustee 'to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the West.'"

"Collateral heirs of the testator immediately brought suit in partition, claiming the above devise void and asserting title to the entire property. The Circuit Court of the City of St. Louis found against the heirs, held the devise valid, and its judgment was affirmed by the Supreme Court in 1860. *Chambers et al. v. City of St. Louis*, 29 Mo. 543. The General Assembly by an act approved March 12, 1859, Laws 1859, p. 280, empowered the City of St. Louis to take, as trustee, devises and bequests for charitable purposes.

"The city in 1860 began the administration of the fund, and by charter provisions and ordinance authorized the city to accept the trust and provide a scheme and plan for its administration. Changes in the details of the plan of administration were made in 1876. Article I, Charter of City of St. Louis, 1876; Ordinance No. 10316; also Clause 10, Sec. I, Art. I, and Sec. I, Art. 14, Charter of City of St. Louis, adopted June 30, 1914; Ordinance No. 27808; Ordinance No. 28840.

"The property passing to the City of St. Louis, trustee, under the Mullanphy will consisted of real estate located in the City of St. Louis, in the county adjoining, and a few parcels in other parts of the State of Missouri. About sixty or seventy-five per cent of said property is improved. The greater portion of the improvements on said property was in poor and dilapidated condition.

"A large portion of the income of said property has been applied from year to year in making additions to and repairing improvements, and in building a 'model tenement' in the nature of an apartment house. Large sums have always been necessary for the item of repairs. Within the last five years more than \$150,000 have been spent in alterations and repairs, with the result that, with the exception of perhaps one or two parcels, all are in excellent condition. The tenement property is in that portion of the city known as the 'Ghetto,' which is inhabited by poor people. The vacant city property and the farm lands have never produced even a reasonable return on the value thereof. The farm lands are largely unimproved and cannot be rented to advantage. The gross annual income from said property is approximately \$42,000.

"By provisions of the charter and ordinances of the City of St. Louis, the fund was originally administered by a board of thirteen members, appointed by the mayor under a ward plan. In 1915 the board of managers was reduced to three members, who are appointed by the mayor and constitute what is known as 'The Board of Commissioners of the Mullanphy Emigrant and Travelers' Relief Fund.' The present board maintains a permanent office at 307 Locust Street in the City of St. Louis, and meets regularly on Monday. The present members of the board are Theo A. Morrey, Pres., Wm. Riley, Vice-Pres., and J. Russack.

"Walter Ermatinger, who has been for nine years employed by the board as assistant secretary and secretary, testified that the records in the office of the board were more or less complete from the foundation of the fund; that during certain periods, practically no records were made or preserved. In 1874 a committee was appointed by the mayor, at the request of the then board of managers of the fund, to investigate and report to the Board of Aldermen their findings, as to the condition and administration of the fund up to said date. The committee's report is set out in full in the evidence. It



is very complete and frankly discloses that during the thirteen years the fund had then been in existence, little attention had evidently been given it by those responsible for its administration. Meetings of the board had been held very irregularly and sometimes at long intervals; no minutes were kept, no rent roll or other complete report of the income that should be returned by said property was ever made up. Much of the property had been allowed to fall in disrepair. The report of the committee concludes with various recommendations concerning the administration of the fund in the future.

"During the interim between 1869 and 1896 the board had a representative whose duty it was to meet the trains coming into St. Louis and endeavor to locate emigrants and travelers who might be entitled to aid from the fund. Between the years of 1894 and 1915 no such representative was employed. In 1915 the present board was appointed and the so-called 'Traveler's Aid Bureau' was established at the Union Station. The Terminal Company furnishes the bureau with an office in the main reception room of the station, which is on the second floor, and when the bureau was opened posted a bulletin calling the attention of its employees to its existence. No special instructions are known to have been given them concerning it, at that time or since. The chief inspector, Mr. Elliott, testified that he had talked to various Terminal employees concerning the work of the bureau when he took charge of the work. Terminal employees give attention only to such emigrants and travelers as apply for relief.

"Mr. Elliott, as chief inspector, has been in charge of the bureau since its establishment. Prior to his appointment he had been for three years in the secret-service department of the Terminal Railroads Association. He is assisted by a woman who is in charge from seven o'clock in the morning until three in the afternoon. It is the duty of these employees to meet all trains entering the Union Station and to look after the welfare of emigrants and travelers who might come

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within the class designated as beneficiaries of the fund. Mr. Morrey, president of the board, visits the station frequently in the evening and confers with the employees. Cases are investigated and if applicants appear to be entitled to relief are referred to the board. The board, if the case is found within their jurisdiction, issues the necessary warrant to furnish the aid needed. No money is paid out by any employee except on authority from the board. The travelers-aid workers receive no supervision from the office of the board direct.

“At the present time the board employs a secretary, an assistant secretary, stenographer, two mechanics, a janitor, and a woman who does ‘social service work,’ in addition to the two inspectors at the Union Station. These employees receive the following salaries: Secretary, \$2,400 per annum; assistant secretary \$1,800; stenographer, \$60 per month; mechanics, \$75 and \$85 per month; janitor, \$60 per month; social-service worker, \$80; inspectors, \$100 and \$60 per month. The members of the board do not receive any salary.

“In 1849, the date of testator’s will, and as appears to have been true for a number of years immediately thereafter, a great many foreign emigrants were passing through St. Louis on their way west, particularly to the mining regions. There were no railroads into St. Louis at that time, and emigrants usually came by steamboat from New Orleans; frequently several hundred would land from a single boat. St. Louis was the out-fitting point for such people. At the outbreak of the Civil War and later upon the completion of the Union Pacific Railroad the number and course of travel of foreign emigrants changed. As is shown by plaintiff’s Exhibit No. 10, the number of such persons found to be entitled to aid under the Mullanphy Fund and who were aided varied greatly from year to year. The number of such persons has gradually decreased until now there are practically no emigrants or travelers of the class referred to.

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"Passenger agents of various railroads, particularly the Wabash, the St. Louis & San Francisco, the C., B. & Q. and the Pennsylvania lines, testified in substance to the same facts with reference to the trend and condition of emigration at the present time. It was the unanimous opinion of these railroad representatives that at the time the testimony was taken, July, 1918, emigration had practically ceased. It appeared from the testimony that during the year 1914 one million two hundred thousand emigrants came to this country; that about one-half of that number landed in New York; that the average number for a few years previous to said date was about one million; that about six per cent of the number landing in New York came to and through St. Louis in 1917. Said witnesses were unanimous in their testimony that the European War then being waged was the immediate cause of the cessation of emigration.

"The condition now existing is very abnormal. Said witnesses all stated that no instructions were given their employees at the station with reference to the Mullanphy Fund.

"Said witnesses further testified that emigration traffic over their roads was handled by a pool under Government direction at the point of landing. That a portion of such travel is assigned to each road. On cross-examination each admitted that they had no direct connection with, nor means of knowing, except in a general way, the volume or status of emigrant travel on their respective roads.

"The station master of the Union Station testified that the office of the Travelers-Aid Bureau is on the second floor of the station; that approximately twenty-five per cent of the traveling public goes to the second floor; that very few emigrants or like travelers, ever reach this portion of the station. Two inspectors are in charge of the bureau, a woman being there from seven o'clock in the morning until three in the afternoon, and a man from three o'clock in the afternoon

until eleven at night. It is the duty of said inspectors to meet all trains and look after all emigrants and travelers in distress, offering, after investigation, the aid of the fund to those who are entitled under the provisions of the will.

“Mr. Elliott, chief inspector, in charge of said bureau, testified that he was under the direction of Mr. Morrey, the president of the board, and Mr. Ermatinger, the secretary. Mr. Ermatinger stated that he had nothing whatever to do with the management of the bureau at the Union Station, and that he was not familiar with the plans being followed there in the carrying out of that feature of the administration of the fund. He further testified, however, that as secretary he had entire charge of the fund. He further stated that he did not know what efforts were being made to locate emigrants and did not think that the employees were meeting all trains. Mr. Elliott testified that the woman who assisted him in the work of the bureau was ‘supposed’ to meet all trains. He testified that the bulk of the traveling public would not see the office of the bureau where located at the station; that the chief inspector in charge of the bureau in effect inspects his own work. Mr. Morrey, president of the board, and Mr. Elliott, chief inspector, testified that Mr. Morrey spent three or four hours of at least four or five evenings each week at the station in the interest of the work.

“Railway employees, practically all from the city passenger department of said roads, testified that no instructions were given to their employees at the station with reference to the existence, or purpose, or operation of the Mullanphy Fund.

“Mr. Clifford, the present station master, testified that since the beginning of the European War emigrant travel had been light; that before the Travelers-Aid Bureau was established cases of distressed emigrants and travelers were referred to the city police; that in only a few instances had such cases been referred to the Mullanphy Board; that he had never sug-

gested to the police to take such persons to the office of the Mullanphy Board. Mr. Clifford further testified that he had never discussed with Mr. Elliott, or any one else, the manner in which the bureau at the station is conducted. Mr. Clifford testified that he had verbally called the attention of his employees to the Travelers-Aid Bureau; that he has under his employ sixty persons, who come in touch with the traveling public. Witness further testified that he was in charge of the station in 1904, and had been employed there between 1894 and said date; that during such time the board had no representative at the station in any capacity.

“Mr. Elliott, chief inspector of the Travelers-Aid Bureau, testified that when employed as a special policeman at the station, as he had been for a number of years prior to his appointment by the Mullanphy Board, he had referred all cases of distressed emigrants and travelers to the station master; that he now, after investigation, refers all cases of emigrants who apply for assistance to Mr. Ermatinger, secretary, and that he is under the secretary's and president's direction. He further testified that from May 12, 1916, to April 30, 1917, there were only seventy-four cases of emigrants locating in the West; that the majority of cases handled by the bureau require simply the locating of relatives and addresses for travelers who are strange to the city.

“Plaintiff introduced a number of witnesses representing various charitable associations, as well as private citizens interested in charitable work, who testified that there are constantly within the confines of the City of St. Louis a class of worthy poor, some of whom might be considered travelers on their way to locate in various parts of the United States and not necessarily in the West, who in their opinion came within the class of beneficiaries closely allied with the class specifically designated by testator in his will. Much of the testimony of these witnesses advanced personal theories as to the interpretation of testator's will and the application of the fund, *cy pres*.

"Theodore Hemmelman, Jr., president of the board in 1894, testified that in his opinion for a period of possibly twenty years the trust estate would fare better if the money were invested in securities on the five per cent basis, instead of real estate. Mr. Morrey and Mr. Russack, members of the present board, both testified that, in their judgment, the real estate belonging to the fund could not be sold at this time except at a great sacrifice; that the improvements are now in good repair, and with the exceptions of some unimproved parcels is yielding a fair return on the investment, and that it would not be advisable to change the form of investment of the trust estate at this time to United States Bonds, or other securities. Seventy-five per cent of the property is now revenue producing. It might not be unwise to sell some parcels in order to be able to improve others.

"No evidence was introduced by or on behalf of the defendant.

"The only evidence introduced by interveners was that showing their relationship to Bryan Mullanphy, deceased."

The decree entered by the court (omitting formal parts and that portion finding the issues generally in favor of plaintiff and against defendant and the interveners) is as follows:

"1. The court finds that the said interveners, certain heirs at law of said testator, Bryan Mullanphy, have no right, title or interest in and to any of the property, real, personal or mixed, which the said Bryan Mullanphy gave to the City of St. Louis in trust, as set out in the plaintiff's petition, and it is therefore ordered, adjudged and decreed that the intervening petition be dismissed and judgment be entered against the said interveners and that it be decreed that they have no right, title or interest whatever in and to the property given by the said Bryan Mullanphy to the City of St. Louis, as trustee, and that there is no equity in their petition filed herein.

"2. The court finds that plaintiff, City of St. Louis, is the testamentary trustee under the will of Bryan Mullanphy, deceased, as set out in plaintiff's petition, and that by said will said Bryan Mullanphy devised to said trustee one equal undivided third of all his property, real, personal and mixed, in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West; that said city accepted by ordinance the trust so created, on November 6, 1851; that the Supreme Court of Missouri at the March Term thereof, in 1860, affirmed the judgment of the Circuit Court of the City of St. Louis, which assigned one-third of all the real property of which Bryan Mullanphy died seized, to the City of St. Louis, as trustee, under the terms of the trust created by the will, as set forth in the petition; that as soon as said city became possessed of the legal title to said property, as trustee, it began the execution of said trust and has done so since said time and is doing so at present; that said trust is administered by said trustee through the instrumentality of a board consisting of three members, styled 'The Board of Commissioners of the Mullanphy Emigrant and Travelers' Relief Fund.'

"3. The court finds that in the management of the real estate since the time said trustee became possessed of the legal title thereof up to the present time much of said real estate has been sold or otherwise disposed of, and other real estate has been acquired by said trustee; that some has been exchanged for other lands and considerable has been condemned for public purposes; that at present the real estate possessed by said trust estate and held by said City of St. Louis as trustee is that which is set out and particularly described in plaintiff's petition.

"4. The court finds that in the management of said estate large expenditures have been and are necessary, which are altogether out of proportion to the sums conferred in benefits, namely, the amounts given to poor

emigrants and travelers coming to St. Louis on their way bona fide to settle in the West; that this has resulted from poor location and dilapidated condition of such real estate, which has required and does require heavy expenditures in the way of repairs, and the rentals arising therefrom are not adequate.

“5. The court finds that the number of emigrants and travelers provided for by the will of said testator is not so large as in former years and is growing smaller, but in the opinion of the court it is not likely to cease altogether; that the total net income of the trust estate is no longer needed for the specific purpose designated by testator; that there are from time to time found within the limits of said City of St. Louis numbers of persons, including travelers, strangers and some emigrants who are helpless and without assistance, who need charitable aid and deserve it, persons who are traveling in various directions other than west, and persons who are traveling west who do not intend to settle there, who become stranded in the City of St. Louis and are in need of charitable aid and assistance. And the court doth order and decree that the surplus income, beyond what may be necessary to properly provide for the persons designated by said testator, shall be used for the purpose of furnishing relief to poor emigrants and travelers generally in the City of St. Louis in need and distress, and found to be worthy of assistance; preference at all times to be given to men with families and women and children coming within the designation aforesaid.

“6. The court finds that it will be to the best interest of the estate to sell the parcels of land described in plaintiff's petition, reserving such property as may be required in the administration and necessary to carry out the purposes of the trust. The court does therefore decree, adjudge and empower said City of St. Louis, as trustee, to sell the property belonging to the trust estate, at public or private sale, on such terms as the Board of Estimate and Apportionment of the City of



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St. Louis, by order, shall recommend. And the court doth appoint Festus J. Wade, James M. Franciscus and Albert T. Terry commissioners to appraise said property and to sell same, acting in conjunction with and assisting the Comptroller of the City of St. Louis in the manner and on the terms specified. Said commissioners are directed to make a full and complete return of their proceedings for the approval of the court.

"7. Said trustee is authorized, empowered and directed hereafter to invest the proceeds received from the sale of its assets and the surplus income beyond what may be used for the purposes of the trust in bonds of the United States Government, the State of Missouri, or issued by any municipality of the State of Missouri.

"8. The court doth further find that in order to carry out this decree it is necessary that further orders and directions be made from time to time. The court, therefore, retains jurisdiction of this cause for said purpose of making such further orders, decrees and judgments as may seem proper and lawful in the premises; that either said city, or the Attorney-General of the State of Missouri for the time being may have leave hereafter at any time, upon giving the other party fifteen days' notice to that effect in writing, to move the court to make such further orders, decrees and judgments as may be deemed proper and lawful.

"9. The court doth further find that the method of conveying and transferring the title to the property of said trust estate, as particularly set forth in Paragraph Seven of plaintiff's petition, is sufficient in law, and therefore the court doth adjudge and decree that whenever any deeds or other instruments conveying or affecting any part of the real or personal property belonging to said trust, shall have been duly authorized by ordinance by the Mayor and Board of Aldermen of the City of St. Louis, and shall be duly executed and signed by the mayor for the time being of said city, with the common seal of the City of St. Louis impressed thereon, is sufficient in law to convey or otherwise affect all the

right, title and interest to such property vested in said city, trustee as aforesaid, whenever such sale shall be authorized by an order of the court herein.

"10. Said trustee is directed by the court to hereafter, on the first Monday of June in each year, file with the Clerk of the Circuit Court of the City of St. Louis, for the information of this court, a statement showing the administration of such trust estate.

"11. The court doth further adjudge and decree that the cost of this proceeding shall be paid by the City of St. Louis, as trustee, from the trust estate under its charge."

Further detailed statement of facts will be made in the course of the opinion.

I. The legal propositions urged by respondent in attempting to have this trust fund administered *cy pres* and the legal propositions advanced by the interveners in support of their contention that a resulting or constructive trust in the trust fund should be decreed in favor of the collateral kindred of the donor, are each based upon the hypothesis that there has been a failure, or at least a partial failure, of the objects for which this charitable trust fund was created. The learned Attorney-General, appellant, however, contends that the court erred in finding, upon the present evidence, such failure had in fact occurred. The first question therefore for determination is: Do the facts shown by the present record justify a court of equity in holding that there has been a failure in whole or in part of the objects for which this trust was founded? This issue is one of fact. It will be conceded by all that there has not been a total failure of the objects of this trust, because the evidence clearly shows that up the date of the trial there were poor emigrants and travelers passing through St. Louis to settle bona fide in the West, who come within the express terms of the will.

Has there been a partial failure? After a careful review of the evidence offered we are of the opinion that

the facts disclosed thereby are not such as will warrant us in answering the above question in the affirmative.

The evidence shows that from 1870 to 1896 the number of persons relieved by this fund averaged approximately 1500 persons annually. For the years 1893, 1894 and 1895, the number thus relieved were 2583, 2120 and 1791 respectively. In the year 1896 the number suddenly dropped to 387. During the years from 1896 to 1915 the number relieved annually ranged from 68 to 411. There appears from the evidence, however, some explanation of the cause of this sudden slump occurring in 1896. From the evidence it appears that prior to 1896 the board in charge of this fund kept representatives at Union Station, whose duty it was to meet incoming trains and hunt up and locate persons coming within the terms of the Mullanphy charity, but that about 1896 this practice was discontinued and *from that date up until the present bureau was established at Union Station in July, 1915*, no one was stationed there whose duty it was to investigate and locate the beneficiaries of this fund.

For the years 1915 and 1916, 142 and 138 persons, respectively have been given relief from this fund, and while it is true that during these two years the bureau had been maintained at Union Station in charge of two employees, yet the further fact remains that in August, 1914, about one year before this bureau was established, the World War began in Europe and that after that time and during the war emigration practically stopped coming to this country.

In other words, the only time during the twenty-two years preceding the trial of this cause when any organized effort was made to keep representatives of this fund at Union Station whose duty it was to meet the traveling public and to discover beneficiaries of this charity, was during the abnormal time of 1915 and 1916 when emigration was practically at a stand-still, and travel of all kinds was more or less affected.

Furthermore, while the effort made by the present board to locate beneficiaries of this fund is very

commendable and appears to be much more than has ever before been done along this line, yet it does not clearly appear from the evidence that all that might be done along this line is even yet being done. The evidence shows that the office of the bureau is located in the west portion of the second floor of the Union Station, and in a portion of the station where the class of persons entitled to relief from this charity seldom go. Neither does it appear that the numbers of employees of this board is sufficient to enable them to find all the persons who might be beneficiaries of the fund.

But even though the evidence showed (which it does not) the exact number of persons annually passing through St. Louis who are entitled to the relief provided, we would still be in the dark as to whether that number was sufficient, when properly administered to by this charity, to absorb the annual net income of this fund. Very little definite information is found in this record as to the net income from this fund. The nearest approach thereto is the testimony of one of the present members of the board, who stated that during the last year the *gross income* from the fund was about \$42,000. That from this amount should be deducted \$10,000, annually, for city and state taxes, and that from fifteen to twenty thousand dollars should be spent for repairs and betterments in that year, and that there should also be deducted the expense of the clerical help in administering the fund.

Upon the present showing we are not warranted in finding that there has been a failure of the objects of this trust.

What the future may bring forth we have no way of knowing. During the period of reconstruction the movement of emigrants and home-seekers to the West may materially increase. It certainly cannot be foreseen that such will not occur. It was the opinion of some of the traffic men who testified in this case that there would be a great influx of immigration following the war.

Until such time as it can be shown with reasonable certainty that there will be a permanent failure of at least a substantial portion of the objects of this trust the question as to the further administration or disposition of the fund does not arise.

The question therefore as to what might be permitted to be done with the fund if there had been a failure of the trust cannot be properly reached or determined in the present case, and any discussion thereof would rise to no higher standard than mere dictum.

II. It is further contended that the court erred in ordering the sale of all the real estate of the trust estate and the reinvestment of the fund in high class bonds and securities. We are of the opinion that this point is also well taken.

Mr. Hemmelman, president of a real estate company and vice-president of a bank, was in 1894 and for about a year and one-half thereafter president of the board having control of this fund. He was the only witness who expressed an opinion in any manner favoring the sale of the property under its present conditions, for the purpose of re-investment in securities. On this point his testimony was as follows: "For a period of twenty years I *presume* the fund would fare better if the money was invested in securities instead of real estate. I believe it would be better if the money were out on a *five per cent* basis." (Italics ours).

Mr. Morrey and Mr. Russack, a majority of the members of the present board in charge of this trust fund, were of the opinion that all of the real estate belonging to the trust estate should not be sold for the purpose of re-investment in Government bonds, etc. Both were of the opinion that it might be for the best to sell off some of the unimproved and non-producing property piece by piece, as the occasion arose and the market would justify, in order to acquire funds with which to improve some of the remaining property, but they were

both of the opinion that it would not be best for the trust estate to make immediate sale of all the property. Mr. Morrey in stating the reason for his opinion testified as follows:

"But you see, your Honor, if you were able to make four per cent net on the property and you tried to sell it, you would be lucky if you could get fifty cents on the dollar, and if you invest that in four per cent securities it is the best you could do, and would be getting two per cent income on the present property. You could not possibly sell it for less than fifty per cent on the dollar, which will bring, say, possibly four per cent, if you sell it at fifty cents on the dollar and invest it in four per cent securities.

"It would not be unwise to give the authority to sell the property in case they should find a fair market and get a fair consideration for the property, it might not be unwise to sell it, but it is hard for me to find a better permanent tangible income than real estate. If you look after it properly it will bring in an income. Where it fails it is the fault of the man who owns it or who manages it. There is a very good example across the street in the Pierce Building. Fourth Street went down, and they said the property was of no account, and here comes a man along and puts up the Pierce Building, and it is to-day possibly one of the best income producing pieces of property in a run-down neighborhood."

There is no showing made in this record as to the condition of the real estate market in St. Louis on this kind of property. The only evidence offered concerning the probable price the property would bring estimates that it would not likely sell for more than one-half its value.

It is impossible to say upon the facts disclosed by the present record that it would be to the benefit of the charity to sell all of the real estate holdings at this time for the purpose of re-investment in State and Federal bonds. There is no evidence from which it might even be inferred that if the property were sold the proceeds

therefrom invested in bonds would yield as large a net return as is now realized.

It is well settled that the power of a court of equity to authorize the alienation of property belonging to a charitable trust should be exercised with caution and one of the prerequisites to the exercise of this power is that it shall "clearly appear that the proposed alienation is for the benefit of the charity." [5 R. C. L. 363; 11 C. J. 355; *Lackland v. Walker*, 151 Mo. 210, 1. c. 268.

We therefore conclude that the court erred, on the showing made, in ordering a sale of all the real estate belonging to the trust estate.

From the foregoing it follows that the judgment should be reversed and the cause remanded with directions to dismiss respondent's bill, without prejudice to its right at any time in the future to institute any further proceeding which might become advisable by reason of changed conditions.

It is so ordered. All concur; *Woodson, J.*, in the result.

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SOUTHWEST MISSOURI RAILROAD COMPANY,  
Appellant, v. PUBLIC SERVICE COMMISSION.

In Banc, February 16, 1920.

1. **STREET RAILWAY SPURS: Discontinuance.** The Public Service Commission has the power to authorize an interurban railway company, permitted by ordinance to lay its tracks in the streets of a city, to discontinue the use of spur tracks connecting the interurban system with railroad stations in said city, no longer essential to the operation of the interurban lines and operated at substantial loss.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that the Commission has no power to relieve a street railway company from its contractual obligation, imposed by its franchise ordinance, to maintain its tracks in designated streets for a designated period.

2. ———: ———: **Restriction on City's Power: Constitutional Provision.** That provision of the Constitution (Section 20 of Article

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12) which forbids the General Assembly to grant the right to construct and operate a street railway within a city "without first acquiring the consent of the local authorities having control of the street" does not confer on the city power, either by ordinance or contract, to impose upon a public utility conditions of operation and maintenance which would confiscate its property or destroy its power to serve the public. This constitutional provision does not mean that a street railway, once properly admitted into the city, cannot be permitted by the State to take up an unprofitable portion of its tracks.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the franchise contract imposes on the street railway company the obligation to operate the tracks, the State, without the city's consent, cannot, under said constitutional provision, grant permission to abandon the tracks, since the city has the right to impose the condition, and the operation of the tracks is not an exercise of a police regulation, such as is the increase or decrease of fares.

3. ———: ———: **Denial for Lack of Jurisdiction: Questions for Review.** When the Public Service Commission has dismissed the application of an interurban railway to discontinue the operation of certain spur tracks laid in the streets of a city, on the sole ground that it is without power to grant the relief, the question whether the franchise ordinance contains express provisions denying the company the right to take up a part of its tracks when the consent of the State is procured, and the question whether the ordinance in itself by its terms and conditions permits the company to remove unprofitable portions of its tracks, cannot be considered in an appeal from an order of the Commission refusing to consider the case on the ground that it had no jurisdiction. These are questions of fact and for determination by the Commission, and the power of the court is simply one of review, after jurisdiction has been assumed.
4. ———: ———: **Consent of City: Abandonment of Track.** It cannot be ruled that if the street railway company is permitted to remove its tracks from a part of the streets which the city consented it might occupy with its tracks, the consent of the city to the company to enter was not given at all.
5. ———: ———: **Abandonment at Will.** A street railway company which has obtained the city's consent to occupy certain streets with its tracks cannot abandon any of them at its will. In no event can it abandon a street except upon a showing that the public will not be injured.
6. ———: ———: **Regulating Use.** The power of the city to regulate the use of streets which the city has consented a street railway company may occupy is to be ascertained by the contractual re-



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lation. The public service character of the company subjects it to regulation, but that fact does not determine whether the regulatory power extends to a particular thing.

7. ———: ———: **Permission to Occupy: Obligation.** A mere permission granted by the franchise ordinance to a railway company to occupy streets for forty-nine years is not a contract to operate for that period, nor can such an obligation be implied from the permission.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the city has consented that a railway company may construct its lines in the streets upon condition that it operate them for 49 years, the condition is valid, does not transgress the police powers of the State, and can be abrogated only by consent of the city itself.

8. ———: **Conditions Imposed by Franchise.** The constitutional provision (Section 20 of Article 12) merely secured from legislative interference the right of a city to deny entrance to a street railway, and the right to impose conditions is implied, but is not unlimited, for the conditions must be within the scope of municipal authority. The city cannot, in the exercise of its power to condition its consent, whether by franchise contract or otherwise, curtail the police power vested in the Legislature, nor draw under its dominion subject-matter not otherwise within its jurisdiction.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that a condition expressed in the franchise contract that a street railway shall operate its lines for a period of 49 years as the price of the city's consent to construct its tracks in designated streets is valid, does not contravene the police powers of the State, and therefore the Public Service Commission cannot grant to the company, without the city's consent, permission to abandon certain spur tracks, on the ground that their further operation is unprofitable and wasteful.

9. ———: ———: **Estoppel.** The question of estoppel in favor of a city, in consideration of conditions imposed upon a street railway company at the time a franchise ordinance to occupy the streets was enacted, does not arise in a case in which the public, represented by the Public Service Commission, is a substantial party.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*  
Judge.

REVERSED AND REMANDED (*with directions*).

*McReynolds & McReynolds* for appellant.

The fact that the Constitution requires the consent of the municipal authorities to the grant of the use of the streets of such city for street railway purposes, does not prevent the Public Service Commission from granting to a street railway company relief from unreasonable requirements of an ordinance granting such franchise rights in the streets. A careful reading of Section 20 of Article 12 of the Constitution shows that the limitation on the power of the General Assembly is not general, but is strictly limited to the requirement that the consent of the local authorities having control of the streets intended to be used by the street railway must be obtained. The legislature is not even prohibited from fixing the manner and terms on which this consent may be obtained. An investigation of the statutory enactments since the Constitution of 1875 shows how the General Assembly has progressively assumed greater control over the granting of such franchises and placed limitations around the rights and powers of the municipality. R. S. 1879, sec. 4879; R. S. 1889, secs. 1523, 1824, 1825, 1826, 1827; Secs. 6115-6-7-8-9, R. S. 1899; Laws 1887, p. 40. A municipality has no power to grant a franchise to a railroad over its streets unless the same is given by constitutional or legislative authority. *A. & P. Railroad v. St. Louis*, 66 Mo. 256. Such powers were first granted by legislative authority. *Fink v. City of St. Louis*, 71 Mo. 52; *State ex rel. Kansas City v. East Fifth St. Ry. Co.*, 140 Mo. 539; *Kavanaugh v. St. Louis*, 220 Mo. 496. The Legislature has made clear its meaning as to the powers, authority and scope of duty of the Public Service Commission. *State ex inf. v. Gas Co.*, 254 Mo. 515; *State ex rel. v. Pub. Serv. Comm.*, 270 Mo. 547.

*A. Z. Patterson*, General Counsel, *James D. Lindsay*, Assistant Counsel, for Public Service Commission.

(1) That the Legislature attempted to grant to the Public Service Commission power to release a street

railway company from a franchise obligation entered into upon a subject, essentially contractual in its nature, and of the very essence of the purpose for which the company was chartered, and the franchise granted, is most doubtful. Public Service Commission Act, sec. 2, subdivisions 5, 7 and 26; Sec. 16, subdivisions 2, 3, 8 and 9; Secs. 26, 27, 43, 47 and 49; State ex rel. United Railways v. Commission, 270 Mo. 442; Lusk v. Atkinson, 268 Mo. 109; State ex rel. v. Commission, 192 S. W. 460; Quimby v. Pub. Serv. Comm., 223 N. Y. 224. (2) The grant of the franchise by the city, in respect of use of its streets, and acceptance thereof by the company, constituted a contract which neither the city nor the company could annul without the "consent" of the other. Sec. 20, Art. 12, Constitution; Springfield Ry. Co. v. City of Springfield, 85 Mo. 674; Hovelman v. K. C. Horse Ry. Co., 79 Mo. 632; State v. East Fifth St. Ry. Co., 140 Mo. 539; St. Louis & M. R. Railroad Co. v. Kirkwood, 159 Mo. 239; Blair v. Chicago, 291 U. S. 400; Grand Trunk Ry. Co. v. South Bend, 227 U. S. 544, 44 L. R. A. (N. S.) 405. (3) The State may authorize a city and a street railway company to make an inviolable contract for a definite and not grossly unreasonable period, for the occupation and use of certain streets of the city by the company, in the service of the public. Milwaukee Electric Ry. & Light Co. v. R. R. Comm., 238 U. S. 175; Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 273; Detroit v. Detroit Ry. Co., 184 U. S. 382; Cleveland v. Cleveland City Ry. Co., 194 U. S. 533. Provided the authority be granted in express and unmistakable terms; and in this case the authority is constitutional, and unmistakable. Sec. 20, Art. 12, Constitution. And the unabridged police power of the State to prescribe reasonable rates, and regulations, legislative in nature, upon subjects within the scope of the legislative power reserved by the State (Sec. 5, Art. 12, Constitution; Sedalia v. Commission, 204 S. W. 497; Fulton v. Commission, 204 S. W. 386; St. Louis v. Commission, 207 S. W. 799; Kansas City v. Kansas City Rys. Co., 140 Mo. 559;) does

not destroy the contractual power of the city, exercised upon a contractual subject, in the manner and within the limits prescribed by said Section 20. (4) The State has set a limit upon its own power over the streets of its cities in the one respect of the occupation and use of those streets by a street railway company, in that the city must be contracted with, must give consent in its own constitutional right, as a condition precedent to such occupation and use. The city lets the use of a definite place, for a definite time, and for a definite purpose; the company enters upon the place, for the time, and to carry out the purpose—a service to the public for its own prospective gain. (5) Irrespective of all the foregoing considerations, the order of the Commission should be approved, because it could not properly grant an application which neither alleged inability to operate the spurs, nor a loss on all the operations of the company, nor such impairment of its finances as would impair its ability to render efficient service to the public, upon other or more important branches of its system. *State ex rel. Mo. Pac. Ry. v. Atkinson*, 269 Mo. 645; *Iowa v. Old Colony Trust Co.*, 215 Fed., 377 L. R. A. 1915A. 549.

BOND, C. J.—The plaintiff is an incorporated interurban railway company connecting Carthage, Joplin, Webb City and other towns in Missouri, and extending into Kansas. The construction of this street railway in the City of Carthage was under an ordinance permitting the assignor of the company the user of a large number of local streets, and requiring in consideration thereof interurban connections by electric rapid transit, with certain other towns named in the ordinance. These interurban connections were duly constructed and are now fully maintained by plaintiff, which, also, as incidental thereto, ran spur tracks through the streets of Carthage connecting its interurban system with two railroad stations in that city. Over these spur tracks transfers were issued by the rapid transit lines. The plaintiff asked the Public Service Commission to discontinue these

spur tracks, which it alleges were not essential to the maintenance of its interurban lines and which were sparsely used, ran over a very short distance and could not be operated without a loss of \$2500 a year or \$50,000 in 20 years. The Commission took the view that it was without the power to grant the relief sought, however "meritorious the case presented by the company might be" and dismissed the complaint. Proper steps were taken to obtain a review of the findings and orders of the Commission, which were sustained by the Circuit Court of Cole County, from which judgment the railway company duly appealed.

I. Unless the issue in this case is distinguishable in principle from the one presented in *City of St. Louis v. Public Service Commission*, 207 S. W. 799, this appeal is dominated by that ruling and the judgment of the circuit court will have to be reversed and the order of the Commission set aside. The learned counsel for the Commission concede the rectitude of that ruling and the cases sustaining it in this jurisdiction, but insist that said ruling related to the question of the power of the Commission to raise the rates of water, telephone and street railway companies "above those fixed by contract" with a municipality, and that they do not relate to cases like the present which involves the rights of a utility (in this instance a street railway) to discontinue the operation of any of its tracks constructed under a permissive ordinance, for the reason that it could be carried on only at a great loss.

The franchise of a street railway company is derivable solely from the Legislature. Its right to exercise that franchise over the streets and alleys of a particular municipality, is subject to the regulatory control of such city, which may evidence that control by an ordinance consenting to the use of its streets and alleys and designating those over which the street railway may operate its State-derived corporate powers. [Sec. 20, Art. 12, Con-

stitution 1875.] It was ruled that the City of St. Louis, in the exercise of such a regulatory control over its streets, could not make an inviolable contract with a street railway for a fixed rate of fare; that to do so would impinge upon the reserve power of the Legislature to exercise plenary control of any matter falling within the domain of the police power, as rate-making does. It was further held that Section 20 of Article 12 was not designed nor intended to abridge the full power of the Legislature over the class of subjects embraced within the inalienable police power of the State. [Const. Art. 12, sec. 5; *Tranberger v. Railroad*, 250 Mo. 46, affirmed 238 U. S. 67.] It was also held that Section 20 of Article 12 of the Constitution, to-wit: "No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained," did not, in terms, nor by necessary intendment, devolve upon the municipalities therein mentioned any part of the unrestricted power of the Legislature to deal with all matters pertaining to the police power of the State where not constitutionally prohibited from so doing.

In the exercise of this great lawmaking function, the State is not obstructed by a contract between one of its agencies (cities, towns or villages) and other persons, for the reason that the State cannot alienate any of its sovereign powers which are *necessary* to the public welfare, or essential to the protection of the health, morals and property of its citizens. As an obvious corollary of this principle, no municipality, either by ordinance or contract, can impose upon a public utility essential to the welfare of the people, conditions of operation or maintenance which would confiscate its property or destroy its power to serve the public.

We are quite of opinion that there is no distinction in principle between the obligation (if, indeed, any was imposed by the mere permissive ordinance in question) on the part of the street railway company to maintain two spur tracks, not indispensable to the performance of its interurban duties, at a cost of operation which would preclude them from carrying on and maintaining its interurban system for the benefit of the people of the State served by that convenience, and the duty to exact a reasonable rate for service. Both relate to adequate performance of obligation to the public and are controllable by the Legislature or its authorized agency, the Public Service Commission. [Selectmen v. Cit. St. Ry., 199 Mass. 394.] It is well stated in a recent meritorious publication, viz: "It is settled that the general police power of the State embraces the regulation of the *service* and rates of public utility enterprises for the promotion of public convenience and the general welfare." [Harvard Law Review, Nov. 1918, p. 741.] (*Italics ours*). See, also, *Munn v. Illinois*, 94 U. S. 113, and a number of other decisions, including *State ex rel. Sedalia v. Pub. Serv. Com.*, 204 S. W. 497. See, also, *Union Drygoods Co. v. Ga. Pub. Serv. Com.* U. S. Sup. Ct. Ad. Ops. Feb. 1, 1919, p. 116.

As we understand the finding of the Public Service Commission upon the facts adduced in support of the complaint filed before it, the evidence conclusively showed that the two local spur tracks connected with the general interurban system could only be maintained and operated at a disastrous loss. It seems conceded that the weight of evidence fully sustains this finding of the Public Service Commission, which body only refused relief upon the notion that it was constitutionally prohibited by the terms of Section 20, Article 12, of the Constitution, *supra*. It has been shown that that provision of the Constitution is not restrictive of the powers of the Commission in virtue of its agency as the representative of the Legislature.

It necessarily follows that the judgment of the circuit court sustaining the order of the Commission dismissing the complaint must be reversed and the cause remanded with directions to the circuit court to vacate that judgment and to enter a judgment setting aside the finding of the Commission and remand the cause to that body with directions to proceed in a manner not inconsistent with this opinion. It is so ordered.

**PER CURIAM:**—The foregoing opinion was prepared by our late associate, BOND, C. J., and was thereafter transferred to Court in Banc. After reargument and due consideration the opinion is adopted and the judgment of the circuit court is reversed and the cause remanded with the directions set out in the opinion. *Blair, J.*, concurs in a separate opinion, in which *Woodson, Goode and Williamson, JJ.*, concur; *Graves, J.*, dissents, in a separate opinion, in which *Walker, C. J.*, concurs; *Williams, J.*, not sitting.

**BLAIR, J. (concurring)**—The Public Service Commission decided it was without jurisdiction to entertain a proceeding of this kind, whatever merit might seem to inhere in the facts of a particular case. Whether this view is right or wrong is the sole question presented by this record. Since it has been suggested that the proceeding did not ride off before the Commission on the question of jurisdiction, an examination of its opinion is pertinent. In that opinion the conceded and conclusively established facts were stated as such, and the tendency of the evidence was stated as to the rest. After stating these things and observing that after an application to the city for leave to remove the tracks in question here, appellant “instituted this proceeding before the Commission,” that tribunal stated the question before it thus: “*The city has challenged the jurisdiction of the Commission to grant the relief prayed for and we have concluded this contention is well founded.*” The Commission then proceeds to give its reasons for this



conclusion. It holds (1) that "we have failed to find any authority in the Public Service Commission Law specifically conferring upon the Commission *power* to relieve a street railway company from the performance of franchise provisions granted by the city and accepted by the company, nor do we find such *power* necessary to enable the Commission to carry out the purpose of the law," and (2) that "we reach the same conclusion if we consider the authority of the city as to matters properly included within the franchise granted by it to the street railway company. Section 20 of Article 12, of the Constitution of this State provides," etc. After discussing, in this connection, Section 20 of Article 12 of the Constitution, the Commission, in its opinion, says: "Our conclusion is, that *however meritorious the case* presented by the company *may be on its facts*, this Commission is not clothed with *power* to grant the relief sought." After discussing a cross-complaint of the city and holding it cannot be considered, the opinion concludes: "It follows from the views expressed that the complaint should be dismissed."

It is too obvious for discussion that this opinion of the Commission holds exactly what it says in express words, i. e. that the contention of the city that the Commission has no jurisdiction "is well founded." In *State ex rel. v. Public Service Commission*, 259 Mo. l. c. 710, the Commission had held it was "without authority to grant the relief prayed for 'regardless of any evidence that may be submitted' and 'regardless of the fact that complainant may show such rates, fares and charges to be unjust, unreasonable and confiscatory of its property.'" This court held the Commission had *power* and ordered it to proceed with the matter and dispose of it "as the facts warrant." In this case the Commission has made an express finding it has no jurisdiction, refused for that reason to consider the evidence in reaching its decision, and, I repeat, the sole question is whether this finding of no jurisdiction is correct under the law.

I. In *State ex rel. Public Service Commission v. Missouri Southern Railway*, 279 Mo. 460 and 489, 214 S. W. 381, it was held that a railroad company could not abandon tracks, operated in connection with its main line, without first securing permission from the Public Service Commission so to do. Identical provisions of the Public Service Commission Act of 1913 disclose the intent of the Legislature to apply the same principle to street railways. If these statutory provisions are valid and applicable to relator, then the Commission has reached an incorrect conclusion as to its jurisdiction.

**Abandoning  
Tracks.**

II. The only constitutional provision which is put forward as justifying the holding of the Commission is Section 20 of Article 12 of the Constitution of the State, which is set out in the opinion prepared by Judge Bond in Division and transferred to Court in Banc with the case. This section expressly, so far as concerns the questions in this case, provides that the General Assembly shall not pass any law "granting the right to construct and operate a street railroad within any city . . . without first acquiring the consent" of such city. It is argued this section justifies the action of the Commission in this proceeding. There are two reasons why this position is not tenable here.

There is no contention possible that Section 20 of Article 12 expressly provides that a street railway, properly admitted into a city, cannot be permitted by the State to take up an unprofitable portion of its tracks. All that could be claimed is that the city can impose such conditions as the price of its consent or that such condition is necessarily implied.

(a) The question whether the franchise ordinance contains express provisions denying the company the right to take up a part of its tracks when the consent of the State is procured, and the question whether that ordinance in itself by its terms and conditions permits

the company to remove unprofitable parts of its tracks, cannot be reached in this case. These are questions of fact and for determination, in the first place, by the Public Service Commission. This appeal is from an order refusing to proceed to the consideration of the case, on the ground that the Commission has no power to do so. Whether there is a valid franchise contract between relator and the city which enables the latter effectually to resist the order sought, or, in the absence of such a franchise contract, whether the facts justify such an order are matters for investigation *after jurisdiction has been assumed*. The power of this court is simply one of review, and we are not authorized to review the facts, and make a finding of our own thereon until after the Commission has exerted its power over the facts and made its finding, one way or another. This is true regardless of the manner in which the law allows this Court to review the evidence on appeal in a case like this. For this reason, alone, the judgment should be reversed and the cause remanded to the Commission for the performance of its proper function.

(b) So far as concerns the question of implying a condition from the grant of the right to enter, it is manifest none can be implied in contradiction of the terms of the franchise ordinance. Whether such an implication in this case would contravene that ordinance is a question reached only after the Commission assumes jurisdiction and reaches the facts. This it has not done. For this reason this theory of implication does not answer what is said under (a) *supra*.

III. Even if it be assumed that what is said in Paragraph II, *supra*, is not sufficient to preclude, in the circumstances of this appeal, the further consideration of the case, and that we can assume the franchise ordinance does not expressly or impliedly permit the company to remove tracks under circumstances the evidence is said to tend

Permission to  
Remove Tracks.

to show in this case, the holding of the Commission that it had no jurisdiction is nevertheless erroneous.

(a) It does not appear that the city has actually imposed any condition relating to the right of the street car company to take up track under circumstances which, in the absence of such conditions, would render it lawful.

(b) It has been suggested that since the city consented to the use of certain streets then, if abandonment of a part is permitted, it cannot be said the city ever consented to the entry. This view seems based upon the idea that since the city did not originally consent to the use, solely, of such streets as **Neutralizing Consent.** would be occupied after a part abandonment, the consent of the city completely disappears simultaneously with the taking up of part of the track. The query is, "When did the city ever consent to the use, by themselves, of the parts of the street still occupied after a part abandonment is permitted?" The question this argument is used to answer is whether in giving its consent, the city gives it subject to all the applicable law and in anticipation of the application of that law to its consent, and whether the law applicable permits the State to authorize the abandonment of a part of the whole line to which the consent applied. In such a situation to argue that the consent never was given if part, in a proper case, is permitted to be removed, is to assume that to be true which it is the purpose of the argument to prove. The argument proceeds in a circle. When the question is whether consent was given subject to existing law and whether that law is a certain thing, it is no answer to say that "consent was not given subject to such law because, if the existing law applied to the consent then consent was never given." The argument cannot be advanced by this mode of reasoning.

(c) Like observations apply with equal force to certain arguments based upon the declaration that the constitutional provision is designed to confer upon the city "supreme power" over its streets, and it would

be anomalous to hold that the constitutional provision "while conferring absolute power upon a city to grant the use of its streets in the first instance, it would nevertheless permit a railway company, when the use had been granted, to abandon it at its will, regardless not only of the rights of the city but of the public." This is subject, also, to the further criticism that no effort is being made to justify any view that the company could "abandon the use" of city streets "at its will" in any case. In fact, it has been held it can do nothing of the kind. This proceeding shows it is attempting nothing of the kind. In no event could it abandon a street except upon a showing that convinced the Commission or this court that the public would not be injured. The existence of this proceeding necessarily implies that much. Recurring to the first observation concerning this last mentioned argument, it is clear that in considering the question whether the city possesses a certain right or power, it is not sound argument to assume "the city's power is 'supreme,' is 'absolute,' and, therefore, it has the power we are inquiring about."

(d) It is said further that "the power to grant the right to use the streets in the first instance carries with it the consequent power to regulate that use when granted. This is true not only on general principles, but is emphatically so here because of the contractual relation created between the city and the street railway company by the grant of the use of the streets, and also on account of the public service character of the company." The question of the *regulation* of the use of the streets during occupancy is not in this case. The contractual relation cannot be assumed in argument to be this or that since the inquiry here is what that contractual relation is and includes. The public service character of the relator is the thing which subjects it to regulation, but that character does not answer the question whether the regulatory power extends to a particular thing in this particular case.

**Abandonment  
At Will.**

**Regulation.**

(e) Another argument advanced is based upon the view that since the franchise ordinance gave the relator the right to operate for forty-nine years, therefore the franchise ordinance became a *contract* to operate for forty-nine years the whole line, without change. This is

**Contract to Operate.** necessarily predicated upon the idea that the Commission took jurisdiction of the case and that it based its finding upon the evidence.

The fallacy of this has been pointed out. The Commission held that the question presented was whether it had jurisdiction. It then held it had jurisdiction, could have none under any conceivable state of evidence, refused to consider the facts and dismissed the complaint because it had no jurisdiction. Further, the franchise ordinance did not constitute a contract to operate forty-nine years. This feature of the franchise was not contractual or obligatory. It was permissive. Though it be assumed the city might have imposed an obligation to operate for a fixed period, it cannot be claimed this ordinance pretends to do so. by its terms. The effort made in the argument now under consideration is to imply such an obligation from a grant of a right. If this implication arises in this case it arises in every case. It does not depend upon the constitutional provision referred to. It is argued it is a condition *protected* by that constitutional provision. It is not one *arising out of it*. It amounts, therefore, to a declaration that, as a matter of law, whenever a street car company (railroad and other public service corporation, as well) enters upon the enjoyment of franchise rights, or part of franchise rights granted it, it is obligated to operate the whole during the full period for which the right to operate is granted. This is raising an implication not at all necessary on the facts and clearly in restriction of the police power of the State. During the time the company operated it would be subject to all valid ordinance regulations whether in the franchise or subsequently enacted. The argument implies from the franchise ordinance and a building of the

car lines over a *part* of the streets designated therein, a contract, to operate the lines built, during the whole time over which the right might extend, affixes this implied contract, as a condition, to the consent to enter the city, and holds that this is protected from interference by the State in the exercise of the police power. In the first place, as pointed out, it is not pertinent to the question of jurisdiction; second, it assumes a permissive grant to be a contract; third, it holds that a condition *implied* from an arrangement between a public service corporation and a municipality by its own force frees itself from the exercise by the State of the police power, regardless of its effect in burdening the public with the necessity of paying, on going lines, the expenses of the operation of useless appendages to a street car system. In this case the burden would fall upon those using relator's interurban lines. The principle sought to be established by this argument must be as broad as we have stated it or it is of no force at all to prevent the intervention of the State through the Commission.

IV. It has been consistently held that in giving its consent to the use of its streets by a street railway a city lawfully may impose conditions. The cases are collected in *City of St. Louis v. Pub. Serv. Comm.*, 207 S. W. 799. The authority of the city to condition its assent is not expressly conferred by Section 20 of Article 12. The power is implied from the right entirely to withhold such assent. Section 20 introduced no new principle and created no new right. It merely made secure from legislative interference the right of the municipality to deny entrance to a street railway, a right theretofore quite generally existing and exercised under statutory or charter provisions. Nothing was added to the power itself by making the Constitution rather than the statutes the repository of the power. The right of the city to impose conditions is still an implied right. This right or power is not unlimited. At least as between the municipality and the public as represented by the General Assembly, the

conditions affixed to the consent must be within the scope of municipal authority. Section 20 of Article 12 does not confer upon the city authority, by means of conditions imposed, to draw under its dominion subject-matter not otherwise within its jurisdiction. Neither can such conditions be employed to require the performance of a forbidden act nor to limit the taxing power of the Legislature. The question of estoppel in favor of the city, referred to in cases in this State, does not arise in a case in which the public, represented by the Commission, is a substantial party. It is also settled that a city by means of conditions engrafted upon consent cannot limit, control or interfere with the police power or its exertion in the regulation of street railways. [3 Dillon on Mun. Corp. sec. 1229; St. Louis v. Pub. Serv. Com., supra.] These limitations upon the city's power to condition its consent existed before the adoption of the Constitution. They arise irresistibly out of the nature of municipalities and their relations to the State. They were carried into Section 20 of Article 12 as certainly as was the power to impose conditions at all.

Formerly the Legislature had full power over city streets and rights of street railways thereon. It is still the source of the *powers* of a street railway organized in this State. The charter is from the State. Such charter does not relieve the corporation from obedience to regulatory statutes valid as exertions of the police power. Neither, as stated, can the city in the exercise of its power to condition its consent, whether by franchise contract or otherwise, curtail the police power vested in the Legislature. [State v. Railroad, 242 Mo. l. c. 375; City of Fulton v. Pub. Serv. Com., 275 Mo. 67; City of St. Louis v. Pub. Serv. Com., 207 S. W. l. c. 805.]

The power of the city to refuse admission to a street railway is beyond legislative control. Doubtless there are conditions which may be affixed pursuant to the city's implied power under Section 20 which are equally exempt therefrom. A city in a particular case might im-



pose conditions which are invalid, and it may be the city would not have given its assent to the entry of the company except for these conditions. Whether such conditions are merely void or whether their invalidity is ground for avoiding the whole franchise are not questions determinable on this record.

I concur in the opinion of Judge BOND except as herein otherwise indicated. *Woodson, Williamson and Goode, JJ.*, concur.

GRAVES, J: (dissenting).—I have not changed my views in this case. The Constitution requires the assent of the city, before a street railway company may construct its lines over the streets of the city. The city can say the assent is given, but upon the condition that the street railway company shall operate its lines for a certain and definite number of years. In this case it was 49 years. This is a valid condition, and it requires the assent of the city to undo what has been done. This condition does not strike at the police powers of the State. If the company is losing money, it can increase its charge through the Public Service Commission. The sole case made before the Commission was the loss of money in the operation of the road. The case was heard, evidence taken, and opinion written in which the facts are stated. Under the Constitution the Commission had no power to uproot the franchise contract as to the term the railroad should perform its public service. This term of the contract does not contravene the police powers, and is valid. The rate clauses of these franchises are invalid, because they do contravene the police power. The actual ruling of the Commission may be awkwardly expressed, but the fact remains that they said to the railway company, in effect, if all you say is true, and all your evidence is true, we can't relieve you, because under Section 20 of Article 12, you had to get the assent of the city, and you say that you did get such assent upon condition that the cars were to be run for a definite time, and this condition we can not change, because it was a proper one

under the constitutional provision. In other words, you ask relief which we can't grant under your own evidence and statement of the case. You asked for the constitutional assent of the city, and you say that you got such assent coupled with a lawful condition, which condition you accepted, tore up the streets and built the road. Now when you discover that your road does not pay, you ask us to strike from the contract a lawful condition under Section 20 of Article 12 of the Constitution, and this the Commission has no power to do. This is the substance of the ruling by the Commission, and we think it correct.

The case was in fact tried, and an opinion detailing the facts found was written. The opinion used the word jurisdiction, where it really meant that the Commission has no power, by reason of rights given the city under Section 20 of Article 12, to change or ignore the terms of a written contract. We have held that the Commission can ignore the rate terms of the franchise contract, because such terms entrenched upon the police powers of the State. But we have never gone so far as to say that the Commission can ignore other provisions of the franchise contract, which do not contravene the police powers. In the instant case the Public Service Commission in the opinion simply says we can't ignore this valid condition of this franchise contract. This is the sum and substance of its ruling, and nothing more. The Commission as shown by the opinion exercised its power, but refused relief on the theory that it had no power (jurisdiction) to set aside the franchise contract. The judgment should be affirmed. *Walker, C. J.*, concurs in these views.

STANLEY PALMER, Appellant, v. BANK OF  
STURGEON.

In Banc, February 16, 1920.

1. **SUIT IN ANOTHER STATE: Attachment: Notice by Publication: Main and Ancillary Issues: Jurisdiction.** A Tennessee grain dealer deposited money in a Missouri bank to guarantee a Missouri farmer that his drafts for corn shipped to the grain dealer would be paid. The farmer shipped a carload of corn and took the bill of lading to the bank, and was for the first time informed that the grain dealer had drawn out the guaranty fund. Expressing dissatisfaction, he drew his draft on the grain dealer, which was dishonored by the drawee and returned to the bank. The farmer threatened to sue the bank for surrendering his security without notice, and to settle the matter the bank purchased the corn, placing the amount of the draft to the farmer's credit, receiving its title by an assignment of the bill of lading, and sent it to a Tennessee factor, who sold the corn for the bank, receiving the money therefor. The grain dealer, claiming that he had sustained damages in a large sum on account of the poor quality of four previous carloads of corn purchased from the farmer, brought suit in Tennessee, by garnishment, against the farmer, the bank and the factor, giving notice to the farmer and bank by publication. The bank entered its general appearance, and the factor paid the money into court, to be disposed of according to its decree. Notwithstanding the farmer made no appearance, the court found he was indebted to the grain dealer in a large sum, and adjudged that the grain dealer was entitled to the fund deposited in court by the factor. Thereupon the farmer sued the bank in a Missouri court for the amount of the draft deposited to his credit when the bill of lading was assigned to the bank. *Held*, that the judgment of the Tennessee court impounding the fund was only ancillary to the principal issue, whether the farmer was indebted to the grain dealer, and as he had no property in Tennessee the validity of that judgment depends upon whether the Tennessee court acquired jurisdiction to render a judgment against him on the principal issue.
2. ———: ———: **Appearance: Waiver: Constitutional Question.** Since the defendant bank appeared generally in the Tennessee court, did not object to the jurisdiction of the court over the principal defendant in the attachment proceeding, did not assert the uncon-

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stitutionality of the Tennessee statute which authorized constructive service upon both, and, without any appearance whatever by the non-resident principal defendant, went to trial on the merits of the case, and was defeated, it will not now be permitted to deny the validity of the Tennessee judgment awarding a fund belonging to it to the plaintiff in that case as a creditor of the principal defendant therein; but in a suit by said principal defendant against said bank, in a Missouri court, to recover money placed to his credit in the bank, the question whether the adjudication by the Tennessee court that the plaintiff was indebted to the plaintiff in that attachment suit is binding upon the plaintiff in this, or was void for lack of jurisdiction, is for determination.

3. ———: ———: **Jurisdiction.** No judgment of a state court can have any validity unless supported by a personal notice to the defendant, served within the state, or by his voluntary appearance and submission to the jurisdiction, except in so far as it may be directed against property actually in the state and therefore subject to its jurisdiction.
4. ———: ———: ———: **In Rem.** If the plaintiff at the time the garnishment judgment rendered against him and the defendant bank by the court of Tennessee had never been within that state, did not enter his appearance, and the money, of which it is claimed the Tennessee court acquired its jurisdiction *in rem*, was deposited in the defendant bank in Missouri, payable to plaintiff upon demand, he was not bound by the judgment of the Tennessee court impounding the money for the use of his Tennessee creditor; for that court, neither by statute nor otherwise, could acquire jurisdiction over him or the *res*.

Appeal from Boone Circuit Court.—*Hon. David H. Harris*, Judge.

REVERSED AND REMANDED.

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*Major J. Lilly and McBaine, Clark & Rollins* for appellant.

(1) The judgment of the Tennessee court may be attacked in this proceeding by Palmer if that court had no jurisdiction as to him. *Smith v. McCuthen*, 38 Mo. 416; *Latimer v. Railroad Co.*, 43 Mo. 105; *Pennoyer v. Neff*, 95 U. S. 714; *Marx v. Fore*, 51 Mo. 69; *Eager v. Stover*, 59 Mo. 87; *Barlow v. Steele*, 65 Mo. 611;

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Bradley v. Welsh, 100 Mo. 268; Wilson v. Railroad Co., 108 Mo. 589; Forsyth v. Barnes, 228 Ill. 326, 10 Am. & Eng. Ann. Cases, 710; National Exchange Bank v. Wiley, 195 U. S. 257; Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905. (2) The judgment was absolutely void as to Palmer. He was neither (a) personally served in Tennessee; (b) nor did he have any property in Tennessee; (3) nor did any one who could be reached by personal service in Tennessee, owe him any money. Flexner v. Faison, 248 U. S. 289; Knox Brothers v. E. W. Wagner & Co., 209 S. W. (Tenn.) 638; Pennoyer v. Neff, 95 U. S. 714; Crim v. Crim, 162 Mo. 544; Insurance Co. v. Walden, 238 Mo. 49; New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. Ed. 1140; Shinn, Attachment and Garnishment, sec. 674; Wilson v. Railroad, 108 Mo. 589; Harris v. Balk, 198 U. S. 215; Douglass v. Phoenix Co., 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. 449; Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; L. N. Ry. Co. v. Deer, 200 U. S. 176, 50 L. Ed. 426. (3) The Bank of Sturgeon, a Missouri corporation, was not subject to personal service in Tennessee. Goldie v. Morning News, 156 U. S. 518, 39 L. Ed. 517; Kendal v. American Automatic Loom Co., 198 U. S. 477; Printer v. Colorado Springs Ry. Co., 127 Mo. App. 248; Cabanne v. Graf, 87 Mo. 510. (4) The Tennessee court decided that the \$440 was due from Klyce to the Bank of Sturgeon. The Tennessee court was then powerless to effect Palmer as the limit of its power was to reach a debt of a non-resident due from a resident of Tennessee, who was personally served with process. Jurisdiction over Klyce gave the Tennessee court the right only to condemn debts due from Klyce, to a non-resident. Jurisdiction over Klyce could not give the Tennessee court the right to reach a debt that a non-resident owed a second non-resident to whom Klyce was indebted. Harris v. Balk, 198 U. S. 216, 49 L. Ed. 1023; Wilson v. Railroad Co., 108 Mo. 589; Norvell v. Porter, 62 Mo. 309; New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. Ed. 1140; Douglass v. Phoenix Co., 138

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N. Y. 209, 20 L. R. A. 118, 34 Am. St. 449. (5) Stanley Palmer is not bound by the decision of the Tennessee court impounding the \$440 which that court found Klyce owed the Bank of Sturgeon as the Tennessee court had no jurisdiction over him, and so the Bank of Sturgeon, when it paid the \$440 lost its own money due it from Klyce, and did not have taken away from it a debt which it owed Stanley Palmer. *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518, 36 Sup. Ct. Rep. 613, 60 Law. Ed. 1140; 30 *Harvard Law Review*, 86; *Ruff v. Ruff*, 85 Pa. St. 333; *Poffer v. Graves*, 26 N. H. 256; 2 *Shinn Attachment*, section 725.

*Don C. Carter* for respondent.

(1) The judgment of the Tennessee court impounding, by writ of attachment, the \$440 found within the jurisdiction of the court, and condemning the debt due from Bank of Sturgeon to plaintiff (Palmer) to the extent of \$440 only, is valid and regular under the Tennessee statutes, and entitled to full faith and credit in this State. Attachment, 6 *Corpus Juris*, pp. 30, 33, 35, 37; *Barnhart v. Dollarhide*, 186 S. W. 1. c. 565; *Cochrane v. Bank*, 201 S. W. 575; *Rothschild v. Knight*, 184 U. S. 341; *Norman v. Insurance Co.*, 237 Mo. 582; *Garnishment*, 20 *Cyc.* 978, 980, 1018, 1050; *Chi. R. I. & P. R. Co. v. Sturm*, 174 U. S. 710; *B. & O. R. Co. v. Allen*, 3 L. R. A. (N. S.) 608; *Steer v. Dow*, 20 L. R. A. (N. S.) 263; *Harris v. Balk*, 198 U. S. 215; *B. & O. R. Co. v. Hostetter*, 240 U. S. 624; *N. Y. Life Ins. Co. v. Dunlevy*, 241 U. S. 521; *Pennington v. Fourth Natl. Bank* 243 U. S. 271. The proceedings had in the Tennessee court, impounding the \$440 by attachment, and condemning the debt defendant bank owed plaintiff Palmer, to the extent of \$440 only, was not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving plaintiff of his property without due process of law. Plaintiff Palmer had due process of law. *Pennington v. Fourth Natl. Bank*, 243 U. S. 271; Cases cited *supra*.

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BROWN, C. —This suit was instituted in the Court of Common Pleas of Boone County on September 2, 1916, to recover the sum of \$428.63, the balance which plaintiff alleges in the petition to have been on deposit to his credit in the defendant bank on the — day of August, 1916, which he then demanded, and payment of which was refused.

The answer admits that prior to that date the plaintiff had deposited the amount named in defendant's bank to be paid to him on demand, that on the date mentioned plaintiff demanded the same and that defendant refused payment thereof. The answer further alleges that the defendant was, at the date of said demand, and still is, entitled in equity to hold the said sum of money by reason of the following facts:

“That on or about the twenty-third day of March, 1915, plaintiff shipped to one G. T. Taylor, doing business as the Taylor Grain Company, of Memphis Tennessee, a car of ear corn, billed from Larrabee, Missouri, in Audrian County, to Paris, Texas, *via* the Chicago & Alto Railroad, and drew a draft on said Taylor Grain Company, with bill of lading and invoice attached, for \$485.60, through the defendant Bank of Sturgeon and through the Union & Planters Bank & Trust Company of Memphis, Tennessee; said draft was dishonored by the said Taylor Grain Company at Memphis, Tennessee, and returned to the Bank of Sturgeon, for said plaintiff, by the Union & Planters Bank & Trust Company.

“Prior to the above shipment of corn, the plaintiff had sold and shipped some eight or nine cars of corn to the said Taylor Grain Company of Memphis, Tennessee, and had an arrangement with said company, whereby said company deposited with the Bank of Sturgeon the sum of five hundred dollars, to guarantee plaintiff that it would honor and pay all drafts drawn by plaintiff on said Taylor Grain Company, for cars of corn shipped to it by plaintiff. Some time prior to the shipment of said last car of corn, and on or about the seventeenth day of March, 1915, the Taylor Grain Company

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drew a draft on the defendant Bank of Sturgeon for said \$500 deposit, and defendant paid same, presuming that the business relations between plaintiff and the Taylor Grain Company had ended, as it had been some time since plaintiff had shipped the Taylor Grain Company any corn; and defendant further states that at the time plaintiff drew said \$485.60 draft on said Taylor Grain Company, it informed plaintiff that it had paid out said \$500 to said company on its draft, some few days before.

"Just as soon as the draft for \$485.60 as above mentioned was returned to Palmer through the defendant Bank of Sturgeon, plaintiff made complaint to defendant for having paid said \$500 out, without first having notified him, and demanded of defendant that it take up said bill of lading and pay him the amount thereof, and threatened to sue defendant bank for said \$485.60, if the bank did not pay him the same. Therefore, the defendant bank, desiring rather to try and get out whole on said car of corn, had plaintiff assign said bill of lading and invoice of said car of corn over to it, which plaintiff did on or about April 1, 1915, and on April 5, 1915, defendant paid plaintiff the sum of \$485.60 therefor.

"Defendant bank then forwarded said bill of lading and invoice to one Henry A. Klyce, of Memphis, Tennessee, doing business under the name of Henry A. Klyce Company of Memphis, Tennessee, dealers in grain and grain products and authorized him to sell and dispose of said car of corn for it and for its account, which said company, after quite a while, did, realizing the sum of \$440 therefor, losing a great deal on said corn, by reason of its inferior quality."

The answer then proceeds to state, in substance, that before the Klyce Company forwarded the \$440 to the defendant, the Taylor Grain Company instituted suit by attachment against plaintiff in the chancery court of Shelby County, Tennessee, for damages in the sum of \$908.83 for breach of warranty on other corn previously sold by plaintiff to said Taylor Grain Company, to which suit the defendant was made a party and was duly noti-



fied; that plaintiff was also notified by publication, but failed and refused to appear and defend same, by reason of which judgment was rendered against him for the amount demanded, and the said sum due from the Klyce Company to defendant was impounded and attached, by reason of which it was lost to defendant. The said sum of \$440 was thereupon charged to plaintiff by defendant in his deposit account, leaving the same overdrawn in the amount of \$11.37.

The plaintiff replied by general denial and also pleaded that the Tennessee statute under which the proceeding in the chancery court of Shelby County, Tennessee, was had, was void, in so far as it affected the rights of either plaintiff or defendant to the said sum of \$440 due from the Klyce Company to the defendant, because it is in conflict with the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States "that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law."

The complaint in the Tennessee case was entitled G. T. Taylor, doing business as the Taylor Grain Company, complainant, v. Stanley Palmer, Bank of Sturgeon, Henry A. Klyce, defendants. The first paragraph alleged that the complainant was a citizen and resident of Shelby County, Tennessee; that the defendant Palmer was a non-resident of Tennessee and a resident of Boone County, Missouri; that the Bank of Sturgeon was a Missouri corporation having its place of business in Boone County, Missouri, and that H. A. Klyce was a resident of Shelby County, Tennessee, doing business under the name of the Henry A. Klyce Company.

The second paragraph stated that the defendant Stanley Palmer was indebted to the complainant in the sum of \$908.83 for breach of a contract not connected with this suit. Paragraph three stated that the Bank of Sturgeon was indebted to Palmer as the depositor of

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a large sum of money in said bank, which amount is not stated. Paragraph four stated that defendant Klyce had in his hands as proceeds of the sale of the car of corn here in question \$440, which the plaintiff was advised and believed and charged was the property of Palmer, which the latter claimed to be the property of defendant bank. Paragraph five stated that the complainant was advised that if the said fund was the property of Stanley Palmer, he had the right to come into court and sue by attachment on account of the non-residence of the defendant, to have attachment issue and levied by garnishment upon the fund in the hands of Klyce as the property of Palmer, and if the property was transferred and belonged to the bank he had the right, under Section 5219 of Shannon's Code, to prosecute an attachment bill in the Tennessee court and attach said fund as the property of the defendant bank, and require it, as garnishee, to answer and bring into court whatever amount it owes the defendant, Stanley Palmer, not exceeding, of course, the amount attached in that State in the hands of Henry A. Klyce. Complainant also in this paragraph alleged his right to file his bill in a "double aspect" as the facts are developed on account of the complications set forth, and was without remedy save in that Honorable Court. The sixth paragraph of the complainant charged that "the transfer on the part of defendant Palmer to defendant bank, if any was made, was conceived in fraud, covin, collusion and guile, and made for the purpose and with the intent of hindering, delaying and defeating the complainant in the enforcement of the collection of his just demand, and that the said transfer is, therefore, fraudulent. However this may be, and whether the fund here belongs to defendant Palmer or defendant bank, he has the right to file this bill and reach the said fund under the facts above set forth." The prayer to the complaint was as follows:

"That the defendants named in the caption may be made defendants to this bill; the defendant Klyce by

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process, and the two non-resident defendants by attachment and publication, pursuant to the statute. That an attachment be issued to be levied upon the fund in the hands of Henry A. Klyce, both as the property of defendant Stanley Palmer and as the property of the defendant Bank of Sturgeon. That the defendant Henry A. Klyce be required to answer fully and specifically as to the amount due and the condition and circumstances under which the said property came into his hands, so that the court may determine whether or not the said property is that of defendant Palmer or defendant Bank of Sturgeon. That the defendant Bank of Sturgeon as garnishee, after attachment of the above fund and publication, be required to answer how much and in what way it is indebted to the defendant Stanley Palmer.

“That this bill be treated as a garnishment bill and the answer of defendants Klyce and Bank of Sturgeon be also answers to the attachment and garnishment served upon them.

“That defendant Stanley Palmer be required to answer this bill; but his answer under oath is waived.

“That upon the hearing, complainant have a decree against the defendant Stanley Palmer for the amount above stated, which he has lost on account of said defendant's breach of contract and warranty. That if the fund in the hands of defendant Klyce belong to defendant Palmer, it may be subjected by proper orders of the court to the payment of said decree, and that the complainant have a judgment against the defendant Klyce accordingly. That if the fund in the hands of Klyce be the property of the Bank of Sturgeon, then that a judgment be had against the Bank of Sturgeon, as garnishee, on account of funds in its hands belonging to defendant Palmer, and that the fund in the hands of Klyce be held and subjected by this court to the satisfaction of the decree against the Bank of Sturgeon and judgment be rendered in favor of the complainant against defendant Klyce accordingly.

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"Complainant prays for all such general and special relief as, under the facts, he may be entitled to.

"This is the first application for writ of attachment."

The bank appeared in the Tennessee court and answered, as did also Klyce. Palmer, although notified by publication, failed to appear and as to him the complaint was taken *pro confesso* and judgment rendered as follows:

"This cause was heard this day before the Hon Francis Fentress, chancellor, etc., upon the original bill of the complaint, the answer thereto of the Bank of Sturgeon, Inc., and of Henry A. Klyce, and the order *pro confesso* heretofore entered against the defendant Stanley Palmer. Whereupon, it appearing to the court from the bill which has been ordered to be taken for confessed by defendant Stanley Palmer, that the defendant Stanley Palmer is indebted to complainant, G. T. Taylor, in the sum of \$908.83, and it appearing from the sworn answer of the Bank of Sturgeon, garnishee, which is a non-resident corporation, that it is indebted to the defendant Stanley Palmer in the sum of \$705.92, and it appearing from the answer of defendant Henry A. Klyce, a resident who has been served with process, that he is indebted to the defendant the Bank of Sturgeon in the sum of \$440, and that he has paid said sum into court pursuant to an order made in this cause on November 10, 1915, and it further appearing that said sum has been regularly impounded by writ of attachment issued by this court, together with process for the resident defendant, Henry A. Klyce, and publication as required by law for the defendants Stanley Palmer and the Bank of Sturgeon, both non-residents, said publication being returnable to the January, 1916, rules, and the defendant the Bank of Sturgeon having answered as before stated and the defendant Stanley Palmer having failed to answer and an order *pro confesso* having been entered; it is therefore ordered, adjudged and decreed that the complainant, G. T. Taylor, have and recover of

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the defendant Stanley Palmer the sum of \$908.83, together with all the costs of this cause; that the attachment issued in the cause be and the same is hereby sustained; and that the \$440 found to be due by Henry A. Klyce to the Bank of Sturgeon, which is in turn indebted to Stanley Palmer in a greater sum, be subject to and applied to the payment of the said decree in favor of the complainant, G. T. Taylor, against the defendant Stanley Palmer. The said sum of \$440 having been paid into court and now being in the hands of the clerk and master, it is ordered that the costs of the cause be paid out of the said fund and the balance paid to the complainant or his attorney of record upon the decree herein rendered. It further appearing to the court that this bill was filed on the twenty-eighth day of June, 1915, and that the Bank of Sturgeon, which was the regular bank and place of deposit of defendant Palmer, had notice thereof upon the day it was filed, and that Henry A. Klyce was served with process on the same day, and that the defendant Klyce has held subject to the orders of the court since that date the sum of \$440 belonging to the Bank of Sturgeon, which bank in turn held subject to the orders of the court the deposit of the defendant Stanley Palmer in said bank and that, therefore, defendant Stanley Palmer has had since the filing of this bill actual notice thereof, as well as the constructive and legal notice given by publication, it is ordered that this decree be and the same is hereby made final."

The section of the Tennessee statute upon which the proceeding in the Tennessee court of chancery rests as to the defendant bank is as follows:

"Be it enacted by the General Assembly of the State of Tennessee, that when any person or persons who are non-residents of the State, have any choses in action, or any other property in this State, and indebted to any persons who are non-residents, and the last named non-residents shall be indebted to any citizen of this or any state or states, it shall be lawful for the last named creditor or creditors, without having first secured a judg-

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ment at law, to file a bill in chancery to have said debts, choses in action, or other property attached, and the person or persons who owe said debts to said non-residents, and the person or persons in whose possession such choses in action or other property may be, shall be made defendants to the bill."

Section 3493 of the Tennessee Code is as follows: "The judgment in the garnishment suit, condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive as between the garnishee and defendant."

In its answer to the Tennessee complaint the defendant bank did not question the constitutionality of Section 5219, nor did it raise any constitutional objection to the proceeding nor did it take any steps by appeal, writ of error or otherwise to review the judgment.

I. There is no question between the parties as to the facts in the case. While we have no doubt that they are sufficiently stated in the pleadings, we have, in the foregoing statement, referred to the evidence that their meaning may more clearly appear. Their legal effect may be stated as follows:

The plaintiff was a Missouri farmer engaged quite extensively in raising corn, and has never been in the State of Tennessee. The defendant is a Missouri bank through which he transacted his banking business. He sold a considerable quantity of corn to one Taylor, in

**Appearance.** Memphis, Tennessee, shipping the corn from

Sturgeon, Missouri, by rail, and collecting the proceeds through the defendant bank by draft on Taylor to which the bills of lading were attached. To secure the payment of these drafts Taylor kept on deposit in the Bank of Sturgeon \$500. Four cars of corn had been handled in this way when, on March 13, 1915, Taylor drew on the defendant bank for the \$500 then on deposit and the draft was in due course presented and paid on the 17th of the same month.

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Without having any notice of this surrender of his security, plaintiff loaded another car of corn for delivery at Memphis, for which he received his bill of lading, and took it to the bank to draw on Taylor for the proceeds, and was informed by defendant of the fact that Taylor had no deposit against it. Plaintiff was greatly dissatisfied, but drew his draft on Taylor which was duly dishonored by the drawee and returned to the Bank of Sturgeon. Plaintiff naturally blamed the bank and threatened to sue it for surrendering his security without notice to him, and the bank, to settle the matter, purchased the corn, paying for it the amount of the draft, received its title by assignment of the bill of lading and sent it to one Klyce, a grain factor, doing business in Memphis, for disposition for its account. Klyce sold the corn for \$440, receiving the money therefor, which is now the bone of contention. That this money rightfully belonged to the defendant is evident, and is frankly admitted by both parties to this suit, and was so adjudicated by the Chancery Court of Shelby County, Tennessee. So far as Mr. Taylor was concerned he had, by the withdrawal of his deposit from the defendant bank, successfully laid the foundation for the chancery suit which he began in Tennessee as soon as Klyce received into his hands the \$440.

When the suit was brought at Memphis, the defendant bank employed attorneys to enter its appearance, and defended it. The other defendants were Klyce, who held the money for the bank, and the plaintiff, against whom Taylor was seeking to collect damages which he claimed to have been sustained on account of the poor quality of the four previous carloads of corn which he had purchased and paid for. This last defendant was notified by publication but did not appear.

In the Tennessee chancery suit two separate and distinct burdens rested upon Taylor. The first of these was to recover judgment against Palmer on the claim presented by the bill, and the second, if he should recover such judgment, to subject the money of the bank

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in the hands of Klyce to its satisfaction. The first of these issues was with Palmer and the second with the defendant bank. The question whether jurisdiction of the bank in Missouri could be obtained through the process of the Tennessee court in that suit is unimportant, because it voluntarily submitted itself to the jurisdiction by going into court and trying the issue upon its merit, thus brushing aside all questions of the right of the complainant to obtain jurisdiction of its person. It might, perhaps have appeared only for the purpose of pleading to the jurisdiction, but it did not. It appeared generally. If it could lawfully have appeared for the purpose of objecting to the jurisdiction of the court over Palmer, the principal defendant, it raised no such question. Nor did it assert the unconstitutionality of that section of the code which authorized constructive service upon both. It went to trial upon the merits of its case and was defeated and will not now be permitted to deny validity of the judgment in that respect. But that judgment was only ancillary to the principal issue, the indebtedness of Palmer, who was entitled to his day in court before his property, wherever it might be situated, could be subjected to the payment of the claim. So that unless his property had been lawfully seized by the Chancery Court in Tennessee the judgment against him was a nullity, he being at the time a resident of Missouri and not within the jurisdiction of the court at the time. It is true that had he been in Tennessee and had demanded from defendant bank the payment of his check for the amount of his deposit and it had been refused, he could have sued in Shelby County before any court of law having jurisdiction of such purely legal demands in that county, and in aid of such suit could have attached this very fund and thus appropriated it to the payment of his demand under the provisions of Sections 3461 and 3463 of Shannon's Code of Tennessee. This jurisdiction would have rested upon the fact that he had found *the property of his debtor* in Tennessee and therefore subject to the jurisdiction of that State. In this case no such condition exists. Palmer



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himself is the debtor. He had no property in Tennessee and he denies that jurisdiction of his person could be obtained in that State by attaching the property of a stranger to the controversy, a bank in the State of Missouri, because the bank owed him an equal amount payable upon his check and over its counter in that state. Both parties freely admit that if the judgment so obtained in Tennessee was valid and binding as against Palmer he cannot recover in this suit. If it was void the judicial appropriation of the \$440 in the hands of Klyce to its payment did not bind him and he should have judgment for the balance of his deposit as demanded in this suit. The defendant had its day in the Tennessee court, where this defense was open to it and its failure to make it cannot prejudice the right of the plaintiff.

II. It will be seen from the foregoing that both parties concur in the view that this case hangs solely upon the point whether the Tennessee judgment against Palmer was valid or void as against Palmer, who did not appear to the suit and was not served with process within the State of Tennessee.

**Jurisdiction** At the foundation of this question lies the principle which cannot be too often repeated that the jurisdiction, both legislative and judicial, of the several States of this Union, is, subject to the powers granted to the Federal Government by the Federal Constitution, supreme and absolute over all persons and property within their respective jurisdictions. The word "respective" as we have used it to express the individual identity of the States is used to the same purpose in Article Ten of the Amendments to the Constitution which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are, reserved to the States respectively, or to the people." By its terms the jurisdiction of each state is protected against invasion of the others. It is the foundation of the rule so often repeated by the courts, both State and

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Federal, that no judgment of a state court can have any validity unless supported by personal notice to the defendant, served within the state, or by his voluntary appearance and submission to the jurisdiction except in so far as it may be directed against property actually within the State and therefore subject to its jurisdiction. In that case the several states, through their Legislatures, have provided for proceedings in their courts against such property upon constructive notice to the non-resident owners with the same effect, as to the property, as upon personal service within the State; and judgments rendered upon such notice against the property within the territorial jurisdiction of the State are held to constitute due process of law within the meaning of the Fourteenth Amendment of the Federal Constitution. This doctrine was long ago stated and explained by this court in *Smith v. McCutchen*, 38 Mo. 416, in which we said: "No sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Jurisdiction must be founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise there can be no sovereignty exerted, upon the known maxim, *extra territoriam jus dicenti impune non paretur*. Even, therefore, should a legislature of a state expressly grant such jurisdiction to its courts over persons or property not within its territory, such grant would be treated elsewhere as a mere attempt at usurpation, and all judicial proceedings in virtue of it held utterly void for every purpose." At that time the doctrine was an old one and has since been persistently reiterated by this court as well as by the Supreme Court of the United States. [*Latimer v. Union Pacific Ry.*, 43 Mo. 105; *Marx v. Fore*, 51 Mo. 69; *Eager v. Stover*, 59 Mo. 87; *Wilson v. St. Louis & S. F. Ry. Co.*, 108 Mo. 588; *Assurance Co. v. Walden*, 238 Mo. 49; *Pennoyer v. Neff*, 95 U. S. 714; *Life Insurance Co. v. Dunlevy*, 241 U. S. 518.] In the case last cited the court says (page 522): "It

has been affirmatively held in Pennsylvania that a judgment debtor is not a party to a garnishment proceeding to condemn a claim due him from a third person and is not bound by a judgment discharging the garnishee (*Ruff v. Ruff*, 85 Pa. St. 333), and this is the generally accepted doctrine. [Shinn on Attachment and Garnishment, sec. 728.] Former opinions of this court uphold validity of such proceedings upon the theory that jurisdiction to condemn is acquired by service of effective process upon the garnishee.

"The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the State, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person."

From the law declared in that case and applied to this it follows that the plaintiff was not a party to the garnishment proceeding in the suit between Taylor and the defendant bank and was not bound thereby unless he was properly before the court upon that issue at the time of the trial upon the notice by publication.

III. We now return to the question of the validity of the notice to plaintiff upon which it is now sought to bind him by the Tennessee judgment. It is admitted that he was a resident of Missouri and that, up to the time of the trial of the cause, he had never been in Tennessee, so that the court was without jurisdiction of his person and the judgment under which the money in the hands of Klyce was paid to Taylor was void as to him unless supported by the fact that the proceeding was *in rem* against his property in that state. We are met at the threshold of this inquiry by the admitted fact that he had no interest whatever in the money impounded in that case and paid into court. So that we must look elsewhere for the *res* of which the Tennessee court is said to have acquired its jurisdiction *in rem*, and find it deposited in the

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defendant's bank in the State of Missouri as a general deposit which was payable at the counter of the bank upon the presentation, during banking hours, of a check or other proper writing demanding the whole or any part thereof. Neither the Tennessee court nor the Tennessee Legislature had any power to modify the contract without consent of the depositor, nor did the bank have such power without the like consent. The only claim to jurisdiction over plaintiff or his property is founded upon the fact that the Missouri bank owed him \$440, payable only in Missouri upon demand, so that this money was attached by equitable garnishment by the process of a Tennessee court by authority of a legislative act of that State. That this process gave the court no jurisdiction of the plaintiff for the purpose of adjudicating his personal liability to Taylor is amply shown by the cases we have cited. That he was not bound by the adjudication, in his absence, logically and necessarily follows. That the bank's attorney appeared in the Tennessee court and paid the Taylor claim without adjudicating it, gave the court no jurisdiction over Palmer, and the respondent's attorneys very properly present the case here upon the theory that such jurisdiction and the consequent validity of the judgment against plaintiff is necessary to their recovery.

In accordance with these views the judgment of the trial court should, upon the pleadings and admitted facts, have been for the plaintiff and we accordingly reverse the judgment and remand the cause with direction to so enter it.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the Court in Banc. All concur except *Woodson, J.*, who dissents.

JAMES B. JOHNSON v. UNITED RAILWAYS COMPANY et al., Appellants.

In Banc, February 16, 1920.

1. **SALE OF PROPERTIES: Liability of Vendee for Unpaid Debts: Preference.** Where one company took from another a large amount of property, far in excess of the claim of a judgment creditor of the vendor, for which the said transferee paid no consideration and to which it acquired no title, and placed it beyond the reach of such creditor, such transferee company must pay such judgment creditor. The vendor has the undoubted right to prefer one creditor to another, but it cannot transfer the exercise of the right to another company, so as to authorize the transferee to administer the vendor's assets. [Per CRAMER, Special Judge; WILLIAMSON, J., concurring, in a separate opinion in which WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in Johnson v. United Railways Co., 247 Mo. 1. c. 366.]
2. ———: **Unpaid Judgments: Amount Paid by Assignee: Clean Hands.** If the amount paid by the assignee of unpaid judgments is the amount that the judgment debtor cannot pay and his transferee refuses to pay, the assignee has a justiciable claim against the transferee, and is not chargeable with coming into court with unclean hands for that he paid only one-third of their face value. [Per WILLIAMSON, J.]
3. ———: ———: **Directors Trustee for Creditors.** To the extent to which the assets of a corporation may be regarded as a trust fund for its creditors, the directors are trustees of those assets for such creditors; and where a corporation transfers all its tangible assets to another, the president of such corporation is a trustee for the benefit of those persons who had existing claims against the corporation. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.]
4. ———: ———: ———: **Notice.** Where two corporations, at the time one of them transferred all its tangible assets to the other, had the same executive officers, the same claims department, the same counsel, and, with the exception of one member of each board, the same individuals upon the board of directors of each, the transferee company was chargeable with notice of the ex-

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istence of judgments and suits for judgments against the other company, whether or not the transferee company, in the assignment instruments, assumed to pay such claims. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.]

5. ———: ———: **Assets in Excess of Consideration.** Where one corporation, in consideration of the release of a lease under which another was operating a system of street railways, took over all its tangible assets, assuming to pay its bonded and other contract debts, but not existing judgments for personal injuries, and thereby received property far in excess of the amount of the debts assumed, without paying any consideration for such excess and without the consent of such judgment creditors, leaving their judgments unsatisfied, and took the property under such circumstances as to amount to actual notice of such outstanding claims, the transferee company is legally bound to pay such claims, since the assets of the transferring company constituted a trust fund for the payments of its debts, and a transfer of assets, without consideration, is void as to creditors of the transferor, though it assumed legal form. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Rys. Co.*, 247 Mo. 1. a. 366.]

6. ———: **Assignment, Sale or Release: Substantive Wrong: Equity.** It matters not by what name the transaction by which one corporation transferred all its assets to another is characterized, whether as a sale or assignment or the release of an existing lease, if its effect was to turn over, without consideration, a trust fund held by the one to pay its debts, to the other, and such transferee took the assets, knowing that they far exceeded the debts assumed, and with notice of the unpaid debts of the other, equity will hold the transfer void as to the existing creditors. Equity looks to substance and not form, and will not sanction an unconscionable result merely because it has been brought about by means which simulate legality. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.]

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

**AFFIRMED.**

*H. S. Priest* for appellants.

(1) There is no suggestion in the petition of fraud by inference as a result of a practical common directory

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of the two companies, or their want of contractual capacity as between themselves, and if there was, this would not be sufficient. The two companies would not lose their respective corporate individualities by such fact nor their capacity to contract with each other. R. S. 1909, sec. 3316, par. 7; Peterson v. Railway Co., 205 U. S. 364; Bank v. Big Muddy Iron Co., 97 Mo. 38; Kitchen v. Railway Co., 69 Mo. 224; Noyes Intercompany Relations, sec. 299; Warfield v. Marshall Co., 72 Iowa, 666; Pullman v. Railway Co., 115 U. S. 587; Mooreshead v. Railway Co., 203 Mo. 121. It is at most a circumstance—like relationship between natural persons—which, coupled with other facts, might or might not show fraud. State v. Oil Cos., 194 Mo. 155. (2) In order for plaintiff to recover, it devolved upon him to show that, but for the sale and transfer, he could have resorted to the property sold and conveyed for the payment of his debt. Burns v. Bangert, 92 Mo. 167; Simon v. Smith, 180 Mo. 464. (3) Plaintiff is not entitled to recover because he has neither shown that appellant Railways Company agreed to assume the liabilities of Transit Company, or that it took the assets of Transit Company without any or adequate consideration. Benesch v. Ins. Co., 72 N. E. 674; Baker v. Harpster, 22 Pac. 415; Ferschild v. Vedder, 49 N. E. 151; Goodfellow Shoe Co. v. Prickett, 84 Mo. App. 94; Alexander v. Williams, 14 Mo. App. 13; Kitchen v. Ry., 69 Mo. 224.

*John A. Gilliam* for respondent.

(1) Under the doctrine of *stare decisis*, when a matter has been thoroughly argued and decided, that decision becomes the law of the case, and if the losing party continues to litigate it should be taxed with ten per cent damages, and respondent asks that it be inflicted in this case. (2) The assets of a corporation are impressed with a trust in favor of creditors and no distribution can be made among shareholders until all debts and liabilities have been satisfied. South Bend Toy Mfg. Co. v. Ins. Co., 4 S. D. 173, 178-179; 2 Morawetz on Corp. 790; Berry v.

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Rood, 168 Mo. 316. (3) When the directory and principal officers of two corporations are substantially identical all transactions between them are prima-facie fraudulent as against the rights of creditors. Barrie v. United Railways Co., 125 Mo. App. 120; Noyes on Intercorporate Relations, sec. 124, pp. 194, 195; Alexander v. Williams, 14 Mo. App. 27; Kitchen v. Railway Co., 69 Mo. 251, 254, 261; Sweeney v. Sugar Co., 30 W. Va. 443; Ins. Co. v. Trans. Co., 13 Fed. 578; Railroad v. Evans, 66 Fed. 810; Couse v. Powder Co., 33 Atl. 297; Bank v. Alabama Sanitarium 103 Ala. 358, 369; Montgomery Web Co. v. Dienelt, 133 Pa. St. 585; Bank v. Judah, 8 Conn. 145; Coningham's Appeal, 57 Pa. St. 474; Chouteau v. Allen, 70 Mo. 338. (4) After insolvency the directors sustain a fiduciary relation to creditors and are bound to exercise the the utmost good faith, and upon the least appearance of unfairness, their transactions will be set aside. Hutchinson v. Sutton Mfg. Co., 57 Fed. 998; Bear River Orchard Co. v. Hanley, 15 Utah, 514; Thompson on Corporation (1 Ed.), sec. 4009 to 4016, 4022, 4079, 4080; Woodstock Inv. Co. v. Richmond, 129 U. S. 661. (5) When one corporation owns a controlling interest in another corporation and both are under one control and the officers and directors of both are substantially identical, all transactions as between them constitute a constructive fraud as against the rights of creditors and as to them are void. They cannot sell property to themselves at a valuation fixed by themselves. Farnum L. & T. Co. v. N. Y. Ry. Co., 150 N. Y. 430; Mason v. Pewabic Min. Co., 133 U. S. 50; United Gold and Platinum Co. v. Smith, 90 N. Y. S. 199; Montgomery Traction Co. v. Harmon, 140 Ala. 505. (6) When one corporation acquires all the assets of another corporation, issues its stock in exchange for the stock of the old company, and the old company ceases to be a going concern and the new company continues the business, the new company receives the assets of the old company burdened by its liabilities. Such arrangement has the effect of distributing assets of the old company among its stockholders to



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the exclusion of creditors. This cannot be done. The new company will by operation of law be held to have assumed and agreed to pay the debts of its vendor, including a judgment subsequently recovered against it in an action for negligence which was pending at the time of the transfer. *Berthold & Jennings v. Holliday-Klotz Lumber Co.*, 91 Mo. App. 233; *Camden Interstate Ry. Co. v. Lee*, 84 S. W. 332; *Grenell v. Gas Co.*, 113 Mich. 70; *U. S. Capsule Co. v. Isaacs*, 55 N. E. 836; *Wilson v. Aeolian Co.*, 72 N. Y. S. 150, 64 App. Div. 337, 170 N. Y. 618; *Indianapolis R. R. Co. v. Jones*, 29 Ind. 465; *Thompson v. Abbott*, 61 Mo. 176; *Railroad v. Ashling*, 160 Ill. 373; *Dodson v. Railroad*, 77 Md. 489; 10 Cyc. 303-308; *Thompson on Corporations* (1. Ed.), secs. 405, 8231, 8240-41; *Cook on Corporations* (7 Ed.), sec. 897; *Eaus' Admr. v. Bank*, 79 Mo. 182; *Suddath v. Gallagher*, 126 Mo. 393. (7) And in such case the new company holds the property received from the absorbed company with notice of any trust attaching to it in favor of creditors and cannot claim the rights of a bona-fide purchaser without notice. *The Key City*, 14 Wall (81 U. S.) 661. (8) Defendant's admission of knowledge of the financial conditions of the Transit Company renders it liable to creditors for all assets it acquired without consideration on without an adequate consideration. Under the circumstances in this case such conveyance is absolutely void. *Sloan v. Torry*, 78 Mo. 623; *Kurtz v. Troll*, 175 Mo. 506; 20 Cyc. pp. 508 to 510. And a conveyance of all of one's property while a suit is pending against him is a badge of fraud. That the action is in tort makes no difference. *McCollum v. Crain*, 101 Mo. App. 522. (9) The proof shows the identity of directors of Transit Company and United Railways Company, the control of both companies by Brown Brothers & Co., the receipt by both the directors and stockholders of the Transit Company of two shares of the United Railways Company for each of their five shares of the Transit Company stock, and a contract by Brown Bros. & Co. Syndicate with the other two companies in which Brown Bros. & Co. Syndicate were the simple conduit to transfer

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the United Railways stock to the Transit stockholders, and the Transit stockholder's stock to the treasury of the United Railways Company, and the participation of Brown Bros. & Co., the directors of the two companies, and substantially all the stockholders of the Transit Company in both the purchase and sale of the Transit Company's property, every step being actually and constructively fraudulent as to creditors. *Jones v. Williams*, 139 Mo. 1; *Noyes on Intercorporate Relations*, sec. 123, note, p. 241; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; *United Gold & Platinum Co. v. Smith*, 90 N. Y. S. 199; *Montgomery Traction Co. v. Harmon*, 140 Ala. 595; *Camden Interstate Ry. Co. v. Lee*, 84 S. W. 332; *Railroad Co. v. Howard*, 74 U. S. (7 Wall.) 392; *Union Natl. Bank v. Douglass*, 1 McCrary's Rep. 86; *Gwynn v. Butler*, 17 Colo. 114; *Bosher v. Worrill*, 57 Ga. 235; *Snyder v. Free*, 114 Mo. 360; *Cook on Corporations* (5 Ed.), sec. 671, note 1, p. 1566; *Vance v. McNabb Co.*, 92 Tenn., 47; *Chattanooga Railroad v. Evans*, 66 Fed. 809; *Fort Payne Bank v. Alabama Sanitarium*, 103 Ala. 358; *Montgomery Web. Co. v. Diewelt*, 133 Pa. St. 585; *Couse v. Columbia Co.*, 33 Atl. 297; *Singer v. Hutchinson*, 183 Ill. 606; *Vicksburg Co. v. Citizens' Tel. Co.*, 79 Miss. 341; *San Francisco Railroad v. Bee*, 48 Cal. 398; *Wilson v. Aeolian Co.*, 64 N. Y. App. Div. 337; *Metcalf v. Arnold*, 110 Ala. 180; *Buell v. Rope*, 6 N. Y. App. Div. 113; *Twin Lock Oil Co. v. Marbury*, 91 U. S. 587; *Sawyer v. Hoag*, 17 Wall. 610; *Louisville Trust Co. v. Louisville Ry. Co.*, 174 U. S. 674; *Gratz v. Reed*, 4 B. Mon. (Ky.) 195; *Hurd v. New York Laundry Co.*, 167 N. Y. 94; *Gillett v. Bate*, 86 N. Y. 93; 20 Cyc. 449, note 19; *Benne v. Schnecko*, 100 Mo. 250; *Seger v. Thomas*, 107 Mo. 635.

CRAMER, Special Judge.—Plaintiff brings this suit in equity against the United Railways Company of St. Louis and the Transit Company of St. Louis as assignee of certain judgments for personal injuries recovered by various parties against the Transit Company while it

was operating the street car lines in the City of St. Louis under a lease from the United Railways Company.

The ground on which he seeks to hold the United Railways Company liable appears from the following allegations of the petition:

"Plaintiff further states that on or about the 31st day of October, 1904, the entire property and assets of the said St. Louis Transit Company, including all the improvements and betterments made by it, were transferred to the said United Railways Company of St. Louis, which immediately assumed control and is now in possession thereof, both said companies being at the time of said transfer under one and the same management.

"And plaintiff further states that the object and purpose of said United Railways Company of St. Louis was to absorb said St. Louis Transit Company, by acquiring its assets and succeeding to its business, and to hinder, delay and defraud the creditors of the St. Louis Transit Company, and pursuant to that purpose, said St. Louis Transit Company was merged in the defendant United Railways Company of St. Louis; that on or about the 31st day of October, 1904, the defendant United Railways Company of St. Louis did receive, absorb and take over, without paying any fair and just consideration therefor, all the assets and property of said St. Louis Transit Company, including its business and good will, and said aforesaid leasehold, and also the sum of \$614,015.25 in cash, and thereafter carried on and is now carrying on and operating said street car system and the business as successor to the St. Louis Transit Company, and plaintiff is informed and upon information and belief states that upon receiving said assets and in consideration thereof, the said defendant United Railways Company of St. Louis, assumed and agreed and became liable to pay all liabilities of the said St. Louis Transit Company; and plaintiff is advised that in the absence of any agreement, defendant will, by operation of law, upon the facts aforesaid, be held to have assumed all such liabilities.

"Plaintiff is furthermore advised that the assets and property of said St. Louis Transit Company were, at the time they passed into the hands of defendant aforesaid, a trust fund, for the payment of all debts and liabilities of the St. Louis Transit Company, and when received and taken by defendant, were charged with such liability. And plaintiff says that defendant has appropriated to its own use the said assets and property of the value aforesaid, to-wit, \$614,015.25 in cash, and a great amount of property and assets heretofore mentioned, the exact value of which plaintiff is unable to state, but not less than, to-wit, \$20,000,000 in value.

"And plaintiff further states that the said transfer of the said assets of said St. Louis Transit Company was fraudulent and was conceived and carried out with intent to dispose of all the assets of the St. Louis Transit Company to the use and benefit of the said United Railways Company and the stockholders of St. Louis Transit Company and parties unknown to complainant conspiring with them in order to hinder, delay, defeat and defraud the creditors of said St. Louis Transit Company, and in order to assist the St. Louis Transit Company, its officers and stockholders in concealing the assets of said St. Louis Transit Company, and to hinder, delay, defeat and defraud the creditors of said St. Louis Transit Company, and in order to procure the votes of the stockholders of said St. Louis Transit Company to ratify an agreement to surrender the aforesaid leasehold to it, and to transfer a great part of the assets of said St. Louis Transit Company to said United Railways Company and with intent to hinder delay, defeat and defraud the creditors of said St. Louis Transit Company. said United Railways Company on or about the month of October, 1904, transferred to stockholders of the said St. Louis Transit Company, its own stock of the market value of to-wit, \$1,605,000 and thereby joined in putting that amount of assets which should have gone into the treasury of said

St. Louis Transit Company, out of the reach of creditors of said St. Louis Transit Company, and where executions could not be levied upon the same, and thereby hindered, delayed, defeated and defrauded the creditors of said St. Louis Transit Company, whereby by reason of its participation in said fraudulent proceedings the said United Railways Company failed to get any valid title to the said assets of said St. Louis Transit Company received by it from said company, and became liable to the creditors of said St. Louis Transit Company, for the full amount of the same which have been received, held and used by it."

On the 10th day of March, 1898, the Central Traction Company of St. Louis was incorporated with a capital stock of \$100,000, which was subsequently increased to \$40,000,000, and on July 10, 1899, its name was changed from "Central Traction Company" to United Railways Company of St. Louis."

The St. Louis Transit Company was incorporated on March 2, 1899, with a capital stock of \$3000, later increased to \$20,000,000.

Each of these companies had a board of directors of eleven members, consisting, with one or two exceptions, of the same persons, and the officers of both were the same. Murray Carleton became president of the United Railways Company in 1899, and of the Transit Company in April, 1901, and continued as such until March, 1905. According to his evidence "the controlling interest in these two companies was vested in the men that represented them in an official way."

Prior to the 30th day of September, 1899, the United Railways Company had acquired control of all of the street car lines in the City of St. Louis, excepting one; comprising about two hundred and ninety-three miles of track. The Transit Company had no property. On the 30th day of September, 1899, the following contract of lease was entered into between the two companies:

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CONTRACT OF LEASE BETWEEN UNITED  
RAILWAYS OF ST. LOUIS AND ST.  
LOUIS TRANSIT COMPANY.

"This Agreement, made and entered into between the United Railway Company of St. Louis, hereinafter called 'United Railways,' a corporation duly organized and existing under the laws of the State of Missouri, party of the first part, and the St. Louis Transit Company, hereinafter called 'Transit Company,' also a corporation duly organized and existing under the laws of the State of Missouri, party of the second part, witnesseth that

"Whereas, 'United Railways' is the owner of several lines of railway in the city and county of St. Louis, in the State of Missouri, and of certain bonds and stocks more specifically described in a certain deed of trust to the St. Louis Trust Company bearing date September 20, A. D., 1899, and is willing to lease all of its said lines of railway lying and being situate in the city and county of St. Louis, including all the property and franchises appurtenant thereto, together with all income to be derived from said bonds and stocks, to 'Transit Company' for the period beginning on the first day of October, A. D. 1899, and ending on the first day of April, A. D., 1939, upon the terms and conditions hereinafter stated; and

"Whereas, 'Transit Company' is desirous of acquiring the said lines of railway including all the property and franchises appurtenant thereto, together with any and all income derived from the ownership of the bonds and stocks now owned by 'United Railways,' or which it may hereafter acquire during the term of this lease.

"Now, therefore, this Agreement Witnesseth, That 'United Railways,' for and in consideration of the covenants and agreements hereinafter contained on the part of 'Transit Company' to be by it made, kept and performed, has granted, demised and leased, and by these presents does grant, demise and lease, unto 'Transit Company' all of the railways now constructed, owned or operated by it, or which may be hereafter constructed, owned or operated by it, and all its right, title and estate in and to all its property, real, personal and mixed, now held by it, as owner or otherwise, with all franchises of every sort and kind, to it now belonging, or which it may hereafter acquire, as fully as it now holds, or owns, or may acquire the same, together with all income derived from any bonds or stocks now owned by 'United Railways,' or which may be hereafter acquired by it, provided always, however, that nothing herein contained shall operate to grant or demise, or be construed to include, the franchise to be a corporation heretofore granted to the said party of the first part, or any other right, privilege or franchise, which is, or may be, necessary to preserve the corporate existence or organization of the party of the first part under its charter, and all the rights, privileges and franchises last aforesaid are hereby expressly reserved and excepted from these presents,

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"To Have and to Hold the said demised property, real, personal and mixed, with the franchises unto 'Transit Company,' its successors and assigns, for the full term from the first day of October, A. D., 1899, until the first day of April, A. D., 1939.

"On consideration of the premises, 'United Railways' covenants and agrees that 'Transit Company,' its successors and assigns, shall, at all times during the term aforesaid, have full and exclusive power, right and authority to use, manage and operate said railways of 'United Railways' and shall have the right to fix the tolls thereon, but not at a higher rate than 'United Railways' is authorized so to do; and, further, that 'Transit Company' shall have the full, free and exclusive right to charge and collect all of the tolls to accrue from the railways of the 'United Railways' during the said term and appropriate the same to its own use, and shall have, use and exercise all the rights, powers and authorities aforesaid, and all other lawful powers and privileges which can be lawfully exercised and enjoyed on or about the said demised railways, properties, franchises and premises, as exclusively, fully, amply and entirely as the same might or could have been used by 'United Railways' had this lease and contract not been made.

"And in consideration of the premises 'Transit Company' has agreed, and does by these presents agree, to and with 'United Railways' as follows, to-wit:

"1. That is, 'Transit Company,' shall and will during the continuance of this lease, at its own proper cost, and expense, and without deduction from the rent herein provided to be paid, maintain, operate, work, use and run, and keep in public use the said demised railways in the same manner as 'United Railways,' as the owner or lessor thereof, is now, or at any time hereafter, may be required to do. And 'Transit Company' shall and will, at its own proper cost and expense and without deduction from the rent herein provided to be paid, at all times, during the continuance of this lease, maintain, operate and keep the railways, property and premises hereby demised, and every part of the same, in good repair, working order and condition, and supplied with rolling stock and equipment, so that the business of said demised railways shall be increased and developed. And 'Transit Company' hereby agrees and promises to and with 'Railway Company,' that it, 'Transit Company,' shall and will, at its own proper cost and expense, and without deduction from the rent aforesaid, from time to time, during the term aforesaid do, or cause to be done, to and upon the said demised railways, and premises, any and all repairs and replacements and any and all additions thereon, and improvements which may be reasonably required for the purposes aforesaid, and provide thereon such new and additional rolling stock, equipments and other appliances as shall and may be reasonably required for the purposes aforesaid; and 'Transit Company' shall and will use all reasonable efforts to maintain, develop and increase all the business of the railways hereby demised.

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" 'Transit Company' shall and will keep a complete and accurate record of all additions, acquisitions, betterments and improvements made by it upon said demised premises and property and the amounts of money expended therefor and shall, from time to time, file the same with 'Railways Company,' and, thereupon, when requested by resolution of the board of directors of 'Transit Company,' 'Railways Company' will deliver to 'Transit Company,' or its order, any of its unissued first general mortgage bonds at par in payment for the money so expended, which it would be authorized to use for the same purpose under the terms and conditions of the mortgage securing said bonds; or in payment for said sums of money so expended by 'Transit Company,' 'Railways Company' will deliver at par, when requested, as aforesaid, to 'Transit Company' any of its unissued preferred or common stock.

"And 'Transit Company' will indemnify, save and keep harmless during the continuance of this lease, 'United Railways' from all costs, charges and expenses arising from the management and operation of said railways, and all matters incident thereto.

"2. That 'Transit Company' shall pay to 'Railways' a net annual rental of five dollars per share upon all the preferred stock of 'Railways Company' now outstanding or which may hereafter be issued by 'Railways Company' with the consent of 'Transit Company.' Said rental shall be payable quarterly on the 10th days of January, April, July and October during each and every year thereafter for the full period of this lease, provided, however, that the first quarterly payment shall be made on the 10th day of April, 1900. Payments of the rental herein provided for shall be made at the office of the 'Transit Company' in the City of St. Louis, or at the agency of the 'Transit Company' in the City of New York, either or both, as 'Transit Company' shall, from time to time determine.

"3. That in addition to the rental provided to be paid by 'Transit Company' in paragraph two of this lease, 'Transit Company' shall pay to the 'United Railways' the further sum of one thousand dollars per annum, for the purpose of defraying the expense of maintaining the corporate existence of the railway and traction companies connected with, or interested in, the properties and franchises herein mentioned, which sums shall be paid semi-annually in equal installments at the times and at the place or places hereinabove provided for the payment of the rental.

"4. That in addition to the amounts hereinbefore provided to be paid by 'Transit Company' to 'United Railways' in paragraphs two and three hereof, 'Transit Company' hereby assumes and agrees to pay all of the floating debts of 'United Railways' when and wherever the same may become due and payable.

"5. That 'Transit Company' shall and will also, during the continuance of this lease, pay all taxes and assessments and water rents which may be assessed upon the real estate, personal property, franchises, capital stock, business rental, income, dividends and indebted-



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ness of 'United Railways,' or any of the lines of railway or property leased or operated by it.

"6. That 'Transit Company' shall and will also pay the interest accrued and to accrue, as the same becomes respectively due and payable, on all the bonds heretofore issued, and now outstanding, by 'Railways Company,' or any of the subordinate companies whose property and franchises 'Railway Company' has acquired, said bonds being as follows: . . . .

"7. That 'Transit Company' shall and will, at all times, keep the property of the 'Railways Company' insured against loss by fire, paying the premiums therefor from its own funds, and will, at the expiration of this lease and contract, yield and deliver up the hereby demised railways and properties and their appurtenances, in the same good order and repair as the same are now in, or may be put in during the hereby demised term (reasonable wear and tear excepted), excepting any property sold in accordance with this agreement and contract.

"8. That 'Transit Company' shall and will during the continuance of this lease apply all net surplus earned by it over and above the six per cent annual dividend upon the \$20,000,000 of capital stock, which 'Transit Company' is now authorized to issue, or so much thereof as may from time to time be outstanding, to the betterment, improvement, or extension of the property or railway lines now owned or which may hereafter be acquired, by 'Railways Company,' or to the redemption, payment or retirement of the mortgage indebtedness of 'Railways Company' or of its subordinate companies. In case 'Transit Company' shall purchase out of said surplus earnings any of the underlying bonds issued by any of the subordinate companies, whose property, franchises or stock has been acquired by 'Railways Company,' 'Transit Company' shall have the same right to use the First General Mortgage four per cent bonds, which 'Railways Company,' under its mortgage, is authorized to receive in exchange for said underlying bonds of said subordinate companies, in the same manner and to the same extent as 'Railways Company' would have the right under said mortgage to use the same, and 'Railways Company' shall and will do all things requisite or necessary on its part to be done to carry this provision into full force and effect.

"9. That 'Transit Company' shall and will apply all moneys received by it from 'Railways Company' at the time that this lease goes into effect, save and except what may be necessary to meet current liabilities, including interest accrued upon all mortgage indebtedness, to the improvement of the premises hereby demised, and shall make like disposition of all moneys that 'Transit Company' may subsequently receive from 'Railways Company' through the sale of property that may become useless in the conduct of the business of 'Railways Company,' and 'Railways Company' shall and will turn over to 'Transit Company' all moneys of every character in its possession, or to which

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it may be entitled, at the time that this Indenture goes into effect, and all other moneys that it may subsequently become possessed of from any source whatever during the term of this lease.

"10. That it is the purpose and understanding of the parties hereto that these presents shall go into effect immediately upon their execution and delivery, and all the rights and liabilities of the parties hereto, as herein assumed, covenanted for and agreed to, shall, upon due execution and delivery hereof, become fixed and ascertained, 'United Railways' turning over all assets of every character to 'Transit Company,' and 'Transit Company' assuming all liabilities of every character of 'United Railways.'

"11. That 'United Railways' shall and will, during the term of this contract, maintain its corporate existence and organization, and at all times, from time to time, during the said term and, when requested by 'Transit Company,' its successors or assigns, shall and will put in force and exercise each and every right, and do each and every corporate act, which it may now, or at any time hereafter, lawfully put in force, or exercise, to enable 'Transit Company' to enjoy and avail itself of every right, franchise and privilege in respect to the use, management, renewal, extension or improvement of the premises herein described, or intended so to be, or the business to be carried on, 'Transit Company' agreeing to indemnify and save harmless 'United Railways' against all expense, loss, damage or liability for such exercise of corporate power or performance of corporate acts when exercised or done at the request of 'Transit Company.'

"12. That in case 'Transit Company,' its successors or assigns, shall, at any time or times hereafter, during the continuance of this lease fail, or omit to pay, as the same becomes due and payable, the interest due upon any of the bonded indebtedness recited in section six of this lease, or in case 'Transit Company,' its successors or assigns, shall fail or omit to pay the floating indebtedness hereinbefore mentioned and provided to be paid by 'Transit Company,' its successors or assigns, or any part thereof, when the same shall become due and payable, as hereinbefore specified, then immediately upon the happening of such event, it shall be lawful for 'United Railways,' at its option, to treat this lease as forfeited; or in case 'Transit Company,' its successors or assigns, shall fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in respect to the performance of such covenants or agreements for the period of sixty days, then and in either and every such case it shall be lawful for 'United Railways,' its successors or assigns, to treat this lease as forfeited; and in case 'United Railways' shall, for any such cause, decide to treat the lease as forfeited, it shall be lawful for 'United Railways,' its successors or assigns, at its own option, to enter at once upon the railways and premises hereinbefore demised, and along and upon every part thereof, and remove all persons therefrom, and from thenceforth the said demised

railways and premises, with the equipments and appurtenances thereof, to have, hold, possess and enjoy as of the first or former estate of 'United Railways' in the said demised premises, and upon such entry for non-payment of the interest on the bonded indebtedness as above provided, or for non-payment of the floating indebtedness as herein provided, for non-payment of rent, or breach, or non-performance of any covenant or agreement therein contained to be by 'Transit Company,' its successors or assigns, observed or performed, all the estate, right, title, interest, property, possession, claim and demand whatsoever of 'Transit Company' its successors or assigns, in or to the addition and improvements above mentioned, and in or to the same demised railways and premises, or either, or any part of them, as well as all the right, title and interest of 'Transit Company,' its successors or assigns, in, under or by virtue of this lease, shall wholly and absolutely cease, terminate and become void, anything hereinbefore contained to the contrary in anywise notwithstanding.

"And in case of the re-entry aforesaid, the floating indebtedness, interest and rent provided herein to be paid, shall, up to and until the date of re-entry be deemed and taken as due and payable, and the same shall be paid by 'Transit Company,' its successors and assigns. And it is further declared and agreed that such re-entry shall not waive or prejudice any claim or right of 'Railways Company,' its successors or assigns, for damages against 'Transit Company,' its successors and assigns, on account of such non-performance or breach of any of the terms of this lease; and all such claims and rights are hereby expressly preserved to the said 'Railway Company,' its successors or assigns.

"13. That all cars, machinery, tools, appliances, etc., generally called personal property, of every sort and kind, belonging to 'United Railways,' or held by it as lessee, shall, when this lease goes into effect, be delivered to 'Transit Company.' The same shall be valued by mutual agreement, and, in case said parties cannot agree as to the value, then by appraisers to be appointed in the manner hereinafter provided. In case of the termination of this lease and contract for any cause, 'Transit Company' shall return the said property as inventoried and appraised in as good order and condition as when received, or the equivalent thereof, or pay the amount of such valuation to 'United Railways,' with interest from the date of the termination of this lease.

"14. Upon the termination of this lease, for any cause, arising from breach of covenant by 'Transit Company,' all such property necessary to the operation of the lines of 'United Railways,' as enumerated in Section 13 of this agreement, and all betterments to the property that may be made by 'Transit Company,' by which is meant all cars, tools, tracks, rails, roadbeds, wires, poles, motors and appliances that may by 'Transit Company' be put upon the lines and

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property of 'United Railways,' and necessary to the operation of the said road, shall become the property of 'United Railways.'

"15. That 'Transit Company' shall, at all times, keep at its office in the City of St. Louis full, true and just accounts of any and all moneys received and business done upon the said demised railways, and of all moneys paid, laid out and expended, and liabilities incurred, in connection with the same. The accounts to be kept by 'Transit Company,' as above provided, and any and all accounts which shall, and may be kept, in relation to the said demised railways, or the business of the same, shall, at all reasonable hours and times during the continuation of this lease, be open to the inspection and examination of the President of 'United Railways,' and such other person or persons as 'United Railways' shall, from time to time, by resolution of its board of directors, appoint to examine the same.

"16. That all differences which may arise between the parties. hereto, at any time hereafter, as to the construction of this agreement. or as to the due performance of any covenant herein contained, or as to the value of any property to be allowed by either to the other, shall be conclusively settled by the decision of three arbitrators, or by a majority of them in case of disagreement; such arbitrators to be chosen in the manner following, to-wit:

"'Railways Company' shall select one of the arbitrators and 'Transit Company' shall select one, and the two thus chosen shall select a third. In case either party shall fail to select an arbitrator for the period of ten days, after a request in writing delivered to the president, then the arbitrator appointed by the party not in default shall select an arbitrator for the defaulting party, and these two shall proceed as herein provided in case of the selection by each party.

"17. That all the terms and covenants of this lease and agreement shall bind the parties, their respective successors and assigns; it being intended that the benefits of all covenants shall accrue to successors and assigns, as well as to the original parties, and that performance shall be by successors and assigns as well as by original parties.

"18. That 'Railways Company' covenants and agrees from time to time to make any further deed or indenture to carry out these presents that 'Transit Company' may reasonably demand.

"This contract and lease is made and executed in pursuance of a resolution of the stockholders of the United Railways Company of St. Louis, passed at meeting held on the twentieth day of September, A. D., 1899, and of the board of directors of said company held on the twentieth day of September, A. D., 1899; and a resolution of the stockholders of the St. Louis Transit Company passed at a meeting held on the twenty-first day of September, A. D., 1899, and of the board of directors of said company held on the twenty-first day of September, A. D., 1899.

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"In Witness Whereof, The United Railways Company of St. Louis, party of the first part, has caused these presents to be signed in its name and behalf by its president, and its corporate seal to be hereunto affixed, attested by its secretary, and the said St. Louis Transit Company, party of the second part, has caused these presents to be signed in its name and behalf by its president, and its corporate seal to be hereto affixed, attested by its secretary, this thirtieth day of September, A. D., 1899.

"UNITED RAILWAYS COMPANY OF ST. LOUIS.

"(Seal)

By EDWARD WHITAKER, President.

"Attest:

"JAMES ADKINS, Secretary.

ST. LOUIS TRANSIT COMPANY,

"(Seal)

By EDWARD WHITAKER, President.

"Attest:

"ALBERT H. BAUER, Secretary.

After the execution of this lease the United Railways Company became inactive and did nothing more than maintain its corporate existence. Its entire railroad property was taken over by the Transit Company and operated under the lease until midnight of October 31, 1904, when the United Railways Company again took charge and the Transit Company disappeared from the scene. During this period of time, between June 3d, 1901, and February —, 1904, the suits were brought in which the judgments sued on were obtained against the Transit Company.

When the Transit Company began operations 172,613 shares of its common stock were exchanged for a like number of shares of the common stock of the United Railways Company and \$10 per share in cash, and in this manner it obtained a working capital of about \$1,900,000.

At the end of five years of its operation of the street car lines, September 30, 1904, its financial condition was as follows, according to a statement prepared by its auditor:

ST. LOUIS TRANSIT COMPANY.

Balance Sheet—September 30, 1904

**LIABILITIES.**

**CAPITAL STOCK—**

172,643 shares, par value \$100.00 ..... 17,264,300.00

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St. Louis Transit Company 3 year 5 per cent Collateral Trust Notes, 5,776 Notes, par value, \$1,000 .....	5,776,000.00
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St. Louis Transit Company Refunding and Improvement 5 per cent Gold Bonds, 8,000 Bonds, par value, \$1,000.00 .....	8,000,000.00
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## CURRENT LIABILITIES—

Bill payable .....	\$818,202.00	
Audited vouchers .....	413,323.94	
Unclaimed wages .....	9,245.60	
Trust Fund Certificates—Employees' Savings Deposits .....	6,295.00	
Bond Coupons due and unpaid .....	340,740.00	
Dividends accrued on Preferred Capital stock of the United Railways Company .....	249,790.00	
Employees' badge and punch deposits .....	289.65	
Southern Railway Company First Mortgage Bonds of 1884, due and unpaid .....	2,000.00	
Due to individuals and companies schedule "B" .....	110.00	
<b>Total Current Liabilities .....</b>		<b>\$1,839,996.19</b>

## DEFERRED LIABILITIES—

## Interest Accrued—Not Due:

United Railways Company Funded Debt ....	\$499,644.98	
Collateral Trust Notes .....	120,333.34	
Miscellaneous interest accrued .....	8,139.19	
Rental of Track and Terminals, accrued ....	1,200.00	
Organization expense of the United Railways Company of St. Louis, accrued .....	89.90	
Reserve fund for personal damages, accrued .....	5,566.90	
<b>Outstanding Tickets:</b>		
Old Series .....	\$19,454.66	
New Series .....	18,147.83	37,602.49
<b>Total deferred liabilities .....</b>		<b>672,576.80</b>

## PROFITS AND LOSS—

Loss, December 31, 1903 .....	\$511,249.99	
Profit for Current year .....	766,812.86	255,562.87
<b>Total liabilities .....</b>		<b>\$33,808,435.86</b>

## ASSETS.

## SECURITIES—

United Railways Company of St. Louis First Mortgage Bonds, 2877 bonds, par value .....	\$2,852,158.72
\$1,000.00 .....	
United Railways preferred stock, 82,273 shares, par value \$100.00 .....	7,832,708.20

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United Railways common stock, 172,613 shares, par value \$100.00 .....	17,261,300.00
Louisiana Purchase Exposition Co. 21,000 shares par value \$10.00 .....	210,000.00
Securities due from United Railways Company of St. Louis at their par value for amounts expended for construction, betterments and improvements .....	958,886.16
St. Louis Light Artillery Armory Association ..	2,500.00
	<u>\$29,117,553.08</u>

## SUSPENSE ACCOUNT—

Losses sustained in sale of securities acquired  
under the lease of September 20, 1899, also  
commission and expenses negotiating loans  
to raise funds to pay for amounts expended  
for construction, betterments and improve-  
ments:

United Railways Company 4 per cent bonds, par value \$1,000, 2,500 bonds, net proceeds, \$2,225,000. Loss .....	275,000.00
St. Louis Transit Company collateral trust notes, par value \$1,000, 5,776 notes, net pro- ceeds, \$5,417,691.79. Loss .....	358,308.21
Commission on loan of \$3,500,000.00 at 2½ per cent commission .....	87,500.00
Compensation in connection with the Transit Company refunding and improvement bonds	10,000.00
Expenses for printing in connection with Trans- it Company refunding and improvement bonds, etc. ....	8,880.00
St. Louis Transit Company 5 per cent refund- ing and improvement bonds, par value \$1,000, 8,000 bonds, net proceeds \$5,985,000. Loss .....	2,015,000.00
	<u>2,754,688.21</u>

## CONTRA—

For loss on sale of United Railways Company 4 per cent bonds used for refunding, under- lying liens charged to United Railways Co., 292 bonds, par value, \$1,000, net proceeds \$259,880.00. Loss .....	32,120.00
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	<u>\$ 2,722,568.21</u>
Carried forward .....	<u>\$31,840,121.29</u>

## Johnson v. United Rys.

**MATERIALS AND SUPPLIES—**

General supplies .....	\$286,904.91
Frog shop manufacturing dept. ....	2,596.08
Oil manufacturing dept. ....	1,456.07
Brass foundry .....	5,158.21

Total materials and supplies .....\$ 296,115.27

**CURRENT ASSETS—**

Cash .....	\$ 713,435.73
Cash on deposit to pay bond coupons.....	355,450.00
Cash on deposit for the redemption to People's Railway first and second mortgage bonds and interest .....	60.00
Due from individuals and companies .....	11,505.01
Bills collectable .....	53,093.78
Bills receivable .....	88,431.73
Due from the United States Government, 1'. O. Dept. ....	8,611.12
City of St. Louis .....	4,407.33
Interest accrued on securities owned.....	28,770.00
Dividends accrued on securities owned .....	102,841.25
The Fidelity & Casualty Co. of N. Y. ....	75,000.00
Fidelity Trust Company of Louisville, Ky., for redemption of Southern Railway Company, first mortgage bonds of 1884 .....	2,075.00
Conductors' remittances .....	32.20

Total current assets .....\$1,443,713.15

**DEFERRED ASSETS—**

Special jury deposits .....	\$ 75.00
Insurance paid in advance .....	38,618.72
Water Taxes paid in advance .....	7.50
Indemnity insurance paid in advance .....	753.50
General expenses paid in advance .....	3,195.75
Rent on land and buildings .....	444.99
Taxes paid in advance .....	87,560.95
Conductors' and Motormen's bonus, paid in advance .....	4,211.46
Boiler explosion, Union Depot power station....	10,815.73
World's Fair terminals .....	82,802.55

Total deferred assets .....\$ 228,486.15

Total assets .....\$33,808,435.86

I hereby certify that the above statement of assets and liabilities agrees with the books of the St. Louis Transit Company as of September 30th, 1904, and is correct.

FRANK R. HENRY.

Auditor, St. Louis Transit Company.



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Among the liabilities, here listed, the \$5,776,000 collateral trust notes matured on November 1, 1904. After unsuccessful efforts to provide the means to meet these obligations at maturity, the president of the Transit Company on the 9th day of September, 1904, made the following proposition to the Mercantile Trust Company, which held, as trustee, the stocks and bonds pledged as collateral:

"St. Louis, Mo., Sept. 9, 1904.

"To the Mercantile Trust Company, St. Louis, Mo.

"The St. Louis Transit Company submits for your acceptance the following proposition, which upon acceptance by you shall constitute a binding contract between the Transit Company and the Trust Company, as Syndicate Manager and as Trustee under the Collateral Trust Agreement of the Transit Company, dated November 30, 1901, and as Trustee under the Indenture of Trust between the Transit Company and the Trust Company, dated June 17, 1903, and the Syndicate Manager under an agreement dated February 12, 1904, and the several subscribers to said Syndicate Agreement; first, to authorize the issue of a new and valid series of twenty-year Improvement Bonds to be dated October 1, 1904, with five per cent semi-annual interest coupons attached, payable principal and interest at the Mercantile Trust Company, St. Louis, Mo. The form of the bonds to be substantially the same as those secured by the Indenture of Trust dated June 17, 1903.

"The payment of principal and interest of the new series of Improvement Bonds shall be guaranteed by the United Railways Company in the same form as the bonds secured by the Indenture of Trust dated June 17, 1903, and the guaranty of the United Railways Company shall be secured by a mortgage of that company in due form and legally authorized, covering the same property described in the first general mortgage of said company, dated September 20, 1899, thus constituting a second mortgage on all the property of the United Railways Company.

"2. When the new issue of \$10,000,000 of improvement bonds and the guarantee thereof and of the execution of the mortgage securing such guarantee, by the United Railways Company, shall have been duly and legally authorized, and when the written consent of this agreement within the time herein specified shall have been signed by all the holders of the \$8,000,000 of Improvement and Refunding Mortgage Bonds heretofore sold by the Transit Company, it shall be the duty of the Mercantile Trust Company as trustee under said Indenture of Trust dated June 17, 1903, upon the payment to it of the consideration specified in paragraph third, which payment must be made on or

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before the 1st day of November, 1904, and upon the delivery to it as an interim form or otherwise, of \$8,000,000 of new Improvement Bonds, said delivery being made for the purpose of exchanging the same for \$8,000,000 of Refunding Bonds heretofore sold, and to release and deliver possession of all the bonds and stock pledged with it as security under both of said indentures of mortgage, and to satisfy the latter of record.

"3. The Transit Company agrees on or before the 25th day of October, 1904, to procure execution by a purchase of an agreement to buy from it \$2,000,000 of the new Improvement Bonds at not less than 85 net to it, and also of so many of the securities held by the Mercantile Trust Company as collateral under said two Indentures of Mortgage as will be necessary to provide for the principal of the notes due November 1, 1904, and for certain requirements aggregating \$935,000. Said requirements being for paying, \$205,000; for writing down certain assets, \$379,000, and for \$361,000 current liabilities, unprovided for in the sale of \$8,000,000. Refunding and Improvement Bonds.

"The Transit Company further agrees that out of the proceeds of sale of said securities and of the \$2,000,000 of new Improvement Bonds and otherwise cash to the extent of \$5,776,000 shall on or before the 1st day of November, 1904, be paid to the Mercantile Trust Company as trustee, upon the surrender of all the securities held by said Trust Company, under both Indentures of Mortgage to the purchasers thereof, accompanied by satisfactions of record of both of said indentures; said Trust Company shall apply the proceeds (not being required to advance any money of its own in the premises) to the payment of the outstanding Collateral Trust Notes of the Transit Company secured by the Collateral Trust Agreement of November 30, 1901; said Collateral Trust Notes as paid to be cancelled by the Trust Company.

"4. Upon the execution of the New Improvement Bonds above mentioned the same shall be delivered to the Trust Company and it shall have the right and authority to exchange the same dollar for dollar at par, for the Refunding and Improvement Bonds dated April 30, 1903, now outstanding, and amounting in the aggregate to \$8,000,000, the interest on each series to be properly adjusted as that of November 1, 1904. The balance of the issue, namely, \$2,000,000 are to be certified and held by the trustee for delivery to the purchaser as specified in paragraph third of this agreement, on payment of \$1,700,000, part of \$5,776,000. The funds so received to be applied by the trustee on account of the \$5,776,000 above mentioned, and toward the payment of the five per cent Collateral Trust Notes due November 1, 1904; and upon such exchange being made all the bonds dated April 1, 1903, so exchanged, as well as all of the remainder of said bonds amounting to \$12,000,000 shall be cancelled by the trustee and the new bonds received by the Mercantile Trust Company in exchange for said old Refunding and Improvement Bonds to the extent of \$8,000,000 shall be held by the trustee for the benefit, according to their re-

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spective interests, of the subscribers to the Syndicate Agreement of February 12, 1904, and the extensions thereof.

"5. It is understood as part of this agreement that neither of the parties hereto shall be bound unless the holders of \$8,000,000 of Refunding and Improvement Bonds shall consent hereto in writing on or before the 21st day of September, 1904, to the exchange of said bonds as is herein provided; nor unless the new Improvement Mortgage shall be duly authorized by the stockholders of the St. Louis Transit Company and United Railways Company at their meetings to be held respectively on October 19th and October 20th, 1904; nor unless the securities above mentioned shall be sold before October 25, 1904, as specified in paragraph third of this agreement. In case of the failure in the performance of any of said conditions at the times respectively set forth, and time shall be of the essence of contract, this proposition and the acceptance thereof shall be null and void.

"St. Louis Transit Company,  
By.....President."

The board of directors ratified this contract at a meeting held on September 27, 1904, and adopted the following further resolution:

"Resolved that, subject to the conditions herein named, the president or vice-president of this company is hereby directed to execute the following proposed contract between this company, the United Railways Company of St. Louis and Brown Bros. & Co., as Syndicate Managers, viz.:

"This Agreement, made this, 'the 27th day of September, nineteen hundred and four, by and between the St. Louis Transit Company, a street railway corporation organized under the laws of the State of Missouri, party of the first part, and hereinafter called 'Transit Company,' and the United Railways Company of St. Louis, a street railway corporation organized under the laws of the State of Missouri, as party of the second part, and hereinafter called 'Railways Company,' and Brown Brothers & Company, a co-partnership of the City of New York, as Syndicate Managers, and hereinafter called 'Syndicate,' Witnesseth:

"That the said parties, under the conditions hereinafter stated, do severally contract with each other as follows:

"Under an indenture of lease dated September 30th, 1899, Railways Company leased to Transit Company all of its property as therein specified, and upon the covenants and conditions therein contained, for a term ending on the first day of April, 1939.

"In the operation of said property, and in making improvements, betterments and additions, thereon, as required by the terms of said lease, Transit Company has contracted the following note and bonded indebtedness, namely:

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"(a) Five million, seven hundred and seventy-six thousand dollars (\$5,776,000) par value three-year 5 per cent Collateral Trust Notes, due November 1st, 1904, which notes are secured by a deposit with the Mercantile Trust Company of St. Louis, under a Collateral Trust Agreement bearing date November 30th, 1901, of the following securities, viz.:

"Two million, eight hundred and seventy-seven thousand dollars (2,877,000) par value United Railways 4 per cent General Bonds.

"Four million, eight hundred and ninety-three thousand, five hundred dollars (\$4,893,500) par value United Railways 5 per cent preferred stock.

"(b) Eight million dollars (\$8,000,000) 5 per cent twenty-year gold bonds of a total authorized issue of \$20,000,000, secured by an Indenture of Trust between Transit Company and the Mercantile Trust Company of St. Louis, dated the 17th day of June, 1903; which bonds are secured by a pledge of the bonds and stocks deposited under the Collateral Trust Agreement aforesaid, and subject thereto, and a further deposit of \$3,329,700 par value of the preferred stock of the United Railways Company of St. Louis, and \$17,261,300 par value of the Common Stock of the United Railways Company of St. Louis, and a mortgage upon its leasehold from the United Railways Company as aforesaid, together with the guaranty of the United Railways Company of St. Louis.

"(c) Transit Company has further specific indebtedness, as shown upon August 31st, 1904, of \$1,665,155.17, but which it is estimated the surplus earnings of 1904 will reduce to \$935,000.

"Transit Company is unable to meet the said indebtedness of \$5,776,000 to fall due on November 1st, 1904, as aforesaid, and to pay the said specifically estimated indebtedness of \$935,000 shortly thereafter to mature except by the sale of the collaterals deposited under the two above recited agreements with the Mercantile Trust Company of St. Louis, and these collaterals it cannot dispose of without procuring a release thereof from the aforesaid pledges, and from the right of substitution which the United Railways Company has by reasons of the terms of its guarantee and the trust instrument under which said collaterals are pledged.

"In order, therefore, to procure a release of said securities and to pay its indebtedness as aforesaid, it proposes to make an issue of 5 per cent twenty-year gold bonds, to be called 'Improvement Bonds,' in the aggregate amount of ten million dollars and to obtain the guaranty of Railways Company thereon, secured by a mortgage of the Railways Company upon all of its property, only subject to the lien of the mortgages already existing.

"Article I.

"Transit Company and Railways Company agree as follows:

"1. Transit Company agrees, whenever requested by Railways

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Company so to do, that it will surrender to Railways Company, by proper instruments or conveyance of release, all and singular the property demised by the aforesaid lease of September 30th, 1899, and deliver, assign and transfer to Railways Company, upon such request, the immediate possession of all the said demised property, and all cash, bills receivable or other credits then owned or held by it, for and upon the considerations and conditions hereinafter named; Provided, only that Railways Company, at the time of said request, shall release and fully acquit Transit Company from all liability which then had or may thereafter accrue to Railways Company under or by virtue of any of the terms or covenants of said lease.

"2. Transit Company further agrees that it will cause the \$8,000,000 now outstanding of its Refunding and Improvement Bonds, together with all the unissued bonds of the total authorized issue of twenty million dollars of its said Refunding and Improvement Bonds, to be cancelled, and the Indenture of Trust of June 17th, 1903, to be released and discharged. That it will cause the holders of the eight million dollars of outstanding Refunding and Improvement Bonds to agree to exchange the same at par for a like amount at par of its proposed Improvement Bonds, to be guaranteed as hereinbefore stated, by Railways Company.

"3. That it will enter into an agreement as hereinafter stated, with Syndicate, for the sale of all the bonds and stocks deposited with the Mercantile Trust Company of St. Louis under the Collateral Trust Agreement of November 30th, 1901, and the Indenture of Trust of June 17th, 1903, together with the two million dollars of the proposed Improvement Bonds which remain after the exchange of \$8,000,000 thereof for the \$8,000,000 of the outstanding Refunding and Improvement Bonds.

"That in and by such sale to Syndicate as hereinafter stated Transit Company shall provide that seven million dollars of preferred stock of Railways Company shall be deposited for the use and benefit of Railways Company, upon terms and subject to restrictions to be agreed upon herein between Railways Company and Syndicate.

"4. Railways Company agrees, subject to the approval of the legal majority of its stockholders, to guarantee, said proposed issue of ten million dollars of Improvement Bonds, and to secure its said guarantee thereof by a deed of trust or mortgage upon all of its property, subject only to the mortgage liens already existing thereon.

"Article II.

"1. Transit Company agrees with Syndicate as follows:

"To sell, assign and transfer to Syndicate two million dollars of its proposed Improvement Bonds at eighty-five cents on the dollar (or \$1,700,000 and \$8,227,300 par value of the preferred stock of the United Railways Company of St. Louis, and \$2,877,000 par value of the 4 per cent general mortgage bonds of the United Railways Company of

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St. Louis, and \$17,261,300 par value of the common stock of the United Railways Company of St. Louis, for and in consideration of the sum of \$5,300,000 aggregating the sum of \$7,000,000, of which sum \$6,711,000 shall be paid at the time, upon the terms and conditions and for the uses and purposes specified in a contract between the Mercantile Trust Company as Syndicate Manager and as Trustee, and Transit Company, bearing date of September 9th, 1904. The remainder, viz., \$289,000 shall be paid upon the order of Transit Company or its president.

"2. Syndicate agrees to pay for the said bonds and stocks the amount so specified, at the dates and upon the terms and conditions specified in the next preceding paragraph.

"Syndicate further agrees to cause seven million dollars of the preferred stock of Railways Company so to be acquired by it, to be deposited with a trustee for the use and benefit of United Railways Company, upon the terms and covenants hereinafter made between Syndicate and Railways Company.

"Article III.

"Railways Company and Syndicate agree as follows:

"(a) Railways Company has in its treasury, unappropriated and unissued, shares of common stock of the par value of \$7,652,500. In consideration of the purchase by Syndicate of the stocks and bonds as herein agreed upon between Transit Company and Syndicate, and the agreement to deposit with The National Bank of Commerce in St. Louis, as trustee, for the use and benefit of Railways Company, preferred shares of stock of Railways Company aggregating the total par value of seven million dollars and the agreement of Syndicate to offer to procure for Railways Company, as hereinafter stated, shares of stock of the Transit Company, Railways Company hereby agrees to sell, for the consideration aforesaid and other considerations herein mentioned, and to issue to Syndicate the said shares of common stock of Railways Company aggregating the par value of \$7,652,500; and

"(b) Railways Company further agrees, whenever thereto requested by Syndicate, to demand of Transit Company the surrender of the leasehold and the demised property leased to it under an Indenture of Lease dated September 30th, 1899, as hereinbefore agreed between Railways Company and Transit Company, and immediately upon such surrender, as therein provided, to enter into and upon the premises and the operation of said property, and coincident therewith as between it and Transit Company, to assume the payment of the ten million dollars of proposed Improvement Bonds guaranteed, as herein provided by Railways Company, and all debts then contracted for labor, materials or supplies rendered or furnished to Transit Company.

"(c) Syndicate agrees that it will purchase, upon the terms and conditions hereinbefore stated in Article II, the bonds and stocks then agreed to be sold and purchased, and, immediately upon coming into possession thereof, it will deposit with the National Bank of Commerce

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of St. Louis, Trustee, preferred stock of Railways Company, of the aggregate par value of seven million dollars so purchased for the use and benefit of Railways Company; which stock, or any part thereof, so deposited with said trustee, shall be sold for the use and benefit of Railways Company by said trustee, whenever requested by Railways Company, at such price and upon such terms as Railways may direct.

"(d) Syndicate further agrees that of the common stock of Railways so purchased as aforesaid from Railways Company, it will offer to the share-holders of Transit Company, until the 18th day of October, 1904, voting trust certificates, issued under and by virtue of such a voting trust agreement as Syndicate may organize and make, representing two shares of the said common stock for five shares of the Transit Company Stock, provided said shareholders of Transit Company shall deposit their stock under terms and conditions prescribed by Syndicate for the purpose of such exchange, and upon the basis aforesaid, with The National Bank of Commerce in St. Louis, as agent for Syndicate, on or before said 18th day of October, 1904; and such Transit shares as shall be so exchanged shall be and become the property of Railways Company and be transferred to its treasury. All shares of Railways Company's common stock not so exchanged for Transit stock within said period shall be and remain thereafter the property of Syndicate. Syndicate, however of its own volition, but without any obligation so to do, may thereafter continue to exchange said stock upon said basis, and, should it do so, whatever shares of Transit Company stock Syndicate acquires by such exchange shall become the property of Railways Company.

## "Article IV.

"The covenants between the respective parties hereto shall not be construed as inuring to the benefit or advantages of any person or corporation whose name is not subscribed to this agreement as a party thereto, and this agreement is conditioned upon the authorization by the shareholders of Transit Company of an issue of bonds aggregating ten million dollars at a meeting of the shareholders of said company called for October 19th, 1904, and the authority of the shareholders of the United Railways Company to guarantee the said issue of bonds of Transit Company, and to make a mortgage to secure said guarantee, at a meeting called for the 20th of October, 1904.

"In Witness Whereof, the United Railways Company of St. Louis and the St. Louis Transit Company have caused their corporate names to be hereto subscribed by their respective presidents, and attested by their respective secretaries, and Brown Brothers & Company, Managers, have affixed their firm signature hereto, the day and year first above written.

"United Railways Company of St. Louis,

"By C. H. SPENCER,

"Vice-President.

"(Seal)

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"Attest:

"JAMES ADKINS,  
"Secretary

"ST. LOUIS TRANSIT COMPANY.

"(Seal)

By MURRAY CARLETON,  
President.

"Attest:

"JAMES ADKINS,  
"Secretary.

"BROWN BROTHERS & Co.,  
"Syndicate Managers."

This contract is known and referred to as the Tri-partite Agreement.

On the 27th day of September, 1904, Murray Carleton as president of the Transit Company, gave out the following letter:

"Office of the St. Louis Transit Company.

"St. Louis, September 27, 1904.

"To the Shareholders of the St. Louis Transit Company:

"On the 30th of September, 1899, your company entered into a contract of lease with the United Railways Company of St. Louis, by which it acquired, for a term of thirty years, the right to operate the properties of the lessor, and it immediately entered upon the operation of the property, pursuant to the terms of that lease.

"In making the improvements, betterments and additions to the demised property, as required by the covenants of the lease, the payment of rentals as therein provided for, and in the operation of the properties, it has contracted an indebtedness largely in excess of its available resources.

"In order to pay an indebtedness then due, on the first day of November, 1901, your company authorized an issue of \$6,000,000 of three-year five per cent Collateral Trust Notes, secured by a pledge to the Mercantile Trust Company of St. Louis of \$2,877,000 United Railways Company four per cent General Mortgage Bonds and 48,935 shares United Railways Company five per cent Preferred Stock, which it had acquired for betterments and improvements made upon the property under the terms of the lease aforesaid; \$5,776,000 of these notes were issued and sold, and mature on November 1st, 1904

"The indebtedness of your company continued to increase, so that on June 17th, 1903, upon your advice, it was determined to issue \$20,000,000 five per cent twenty-year Refunding and Improvement Bonds, for the purpose of paying the then existing indebtedness, provide for the payment of the above collateral notes, and create a resource for further improvements and betterments upon the leased property, which it had covenanted to make in the aforesaid lease.



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"These bonds were to be secured by a deposit of the bonds and stock covered by the Collateral-Note pledge and 33,297 shares of preferred stock of the United Railways Company and 172,613 shares of the United Railways Company common stock, a mortgage of its leasehold, and the guaranty of the United Railways Company.

"By the terms of the Indenture of Trust securing the aforesaid issue of bonds, it was provided that \$8,000,000 were to be immediately certified and delivered to your company. These bonds were delivered to your company and sold at the very best price obtainable; the proceeds of the sale, however, failed to meet all the financial requirements of your company.

"By the same instrument, it was provided that \$6,056,000 par value of the bonds should be reserved to pay off and discharge the \$5,776,000 of Collateral Trust Notes outstanding.

"Your company has been unable to sell the bonds so reserved, for an amount which will enable it to meet at maturity the Collateral Trust Notes, and has been unable to secure an exchange of the reserve bonds for the Collateral Trust Notes.

"Under those conditions the reserve bonds are unavailable and valueless to accomplish the purpose for which they were reserved.

"Your company is without financial resources, other than the bonds and stocks pledged as hereinbefore stated, with which to meet its indebtedness, and has no resources to make the improvements, additions and betterments required of it by the above lease.

"Your company proposes an issue of \$10,000,000 of bonds, by your advice, to be guaranteed by the United Railways Company of St. Louis, and its guaranty secured by a mortgage upon all of its property, next in rank of lien to that of its general mortgage, for the purpose of exchanging \$8,000,000 of the proposed issued at par for \$8,000,000 outstanding of the authorized issue of \$20,000,000 Refunding and Improvement Bonds, and to cancel all of the issued and unissued Refunding and Improvement Bonds, and release the Indenture of Trust securing the same, and thereby release the stocks and bonds pledged under the Refunding and Improvement Mortgage.

"The \$2,000,000 of the proposed \$10,000,000 bonds, together with the stocks and bonds released from the lien of the Refunding and Improvement Mortgage, and those remaining under the Collateral Trust Notes, will enable your company to contract with the United Railways Company for the guarantee of its proposed issue of \$10,000,000 of bonds, and for a surrender of the lease (which has become more burdensome than your company can bear) and the sale of these securities to pay off its aforesaid Collateral Note indebtedness.

"To this end, it has made a conditional contract with the United Railways Company and with a Syndicate for the sale of these securities. The United Railways Company has, conditionally, contracted with the Syndicate, to which your company has conditionally sold the securities, to make an exchange of certain common stock, which the Syndicate

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will receive from the United Railways Company by these negotiations for shares of stock held by you in the Transit Company. Your company is advised that the basis of this exchange will be two shares of the common stock of the United Railways Company for five shares of the stock of the Transit Company. The terms and conditions of the exchange are announced by the circular, which is herewith enclosed at the request of the Syndicate Managers.

"ST. LOUIS TRANSIT COMPANY,

"By MURRAY CARLETON,

"President."

On the same day, September 27, 1904, the following letter was addressed by Brown Brothers & Company to the stockholders of the Transit Company, Syndicate Managers.

"New York City, September 27, 1904.

"To the Shareholders of the St. Louis Transit Company:

"Conditioned upon the execution and accomplishment of a tripartite contract between the St. Louis Transit Company, the United Railways Company of St. Louis and a Syndicate, of which the undersigned are Managers, and in accordance with the terms of a covenant therein contained between the United Railways Company of St. Louis and the undersigned, as said Syndicate Managers.

"1. The undersigned do hereby appoint the National Bank of Commerce in St. Louis as their agent, for and in their behalf, to accept and receive the deposit of the shares of stock of the St. Louis Transit Company, subject to the terms of this proposal, and to issue interim receipts therefor, and to receive applications, as hereinafter stated, for participation in said Syndicate.

"(The Transit Company's stock and applications for participation will be received by Messrs. Brown Brothers & Company, at their offices in New York, Philadelphia and Boston, for transmission, without expense to the depositor, to the National Bank of Commerce in St. Louis.)

"2. The shares of stock of the St. Louis Transit Company so deposited must be endorsed in blank under a power of attorney authorizing the transfer of same upon the books of the company, and so deposited with said bank on or before the 18th day of October, 1904; and the deposit must also be accompanied with the enclosed proxy, duly executed.

"3. Upon and subject to the conditions hereinbefore stated, the undersigned, as Syndicate Managers, will exchange with the owner, or his assigns, of the stock so deposited, two shares of the common stock of the United Railways Company of St. Louis for each five shares of the stock of the St. Louis Transit Company, the said United Railways Company's stock, however, to be represented by voting trust

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certificates issued under a voting trust agreement to be formed and made by the undersigned, with such terms and conditions as may seem wise to them, as managers, and shall endure for a period of five years from and after November 1st, 1904, unless sooner dissolved pursuant of the terms of such trust agreement.

"4. The Syndicate, of which the undersigned are managers, has been organized to purchase certain bonds and stocks mentioned in said Tripartite Agreement, belonging to the St. Louis Transit Company, and upon a plan and terms heretofore agreed upon between Syndicate and Managers, after the consummation of which there will remain in the possession of Managers, as the property of the underwriters—

\$2,000,000 5 per cent Improvement Bonds 85 .....	\$1,700,000.00
\$2,877,000 First General Mortgage 4 per cent Bonds of the United Railways Company .....	5,300,000.00
12,273 shares of the Preferred Stock of the United Railways Company .....	
165, 092.80 shares of the Common Stock of the United Railways Company .....	

"At a total of ..... \$7,000,000.00

"It is the desire of Syndicate Managers to afford such of the shareholders of the St. Louis Transit Company as shall deposit their stock, as hereinbefore provided, an opportunity to participate in such purchase of said bonds and stocks under the said Syndicate plan. This offer is, however, entirely without any consideration, and purely voluntary on the part of Managers and Syndicate.

"The application of all such stockholders of Transit Company as, on or before Friday, October 7th, 1904, shall be made in accordance with the subjoined communication to the National Bank of Commerce in St. Louis, as agent for Syndicate Managers, for participation in said Syndicate purchase, will have the attentive consideration of Managers, and allotment upon such applications will be made as soon thereafter as practicable; but Managers may require any such applicant to give a guarantee of his financial responsibility, or security for the full amount of his application, and reserves the right to allot a lesser amount than that applied for.

"BROWN BROTHERS & COMPANY,  
Syndicate Managers."

On the 10th day of October, 1904, the following agreement was entered into between Brown Brothers & Company and a Syndicate:

"Agreement made this 10th day of October, One Thousand, Nine Hundred and Four, by and between Brown Brothers & Company (hereinafter called 'Syndicate Managers'), party of the first part, and the subscribers hereto (hereinafter called severally, the 'Subscribers' and collectively the 'Syndicate'), severally, parties of the second part.

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"Whereas, on the 27th day of September, 1904, Syndicate Managers, as such, pursuant to an understanding with Subscribers and in anticipation of this formal contract, did enter into an agreement (hereinafter called 'Tripartite Agreement') with the St. Louis Transit Company, a corporation, and the United Railways Company of St. Louis, also a corporation, pursuant to a plan of readjustment of the capitalization and affairs of the said two corporations, and for certain other purposes specified in said plan; copies of which contract and plan are hereto attached and made part hereof, and are to be read and constituted as a part of this agreement, with the understanding that no estimate, statement, stipulation, explanation or suggestion contained in said plan is intended for or is to be accepted as a representation of warranty upon the part of the Syndicate Managers, or as a condition of subscription hereto.

"And, Whereas. It is estimated under the Tripartite Agreement and plan aforesaid that the Syndicate will receive and retain for their own account the following bonds and stocks, to-wit:

- \$2,000,000. St. Louis Transit Company five per cent proposed Improvement Bonds;
- 2,877,000. United Railways Company of St. Louis four per cent First General Mortgage Bonds;
- 1,227,300. (par value) United Railways Company of St. Louis five per cent Cumulative Preferred Stock;
- 18,009,280. (par value) United Railways Company of St. Louis Common Stock.

"And Whereas, The estimated aggregate amount of money required under the terms of said Tripartite Agreement, on the part of Syndicate, to make payment of the aforesaid bonds and stocks, and to do the things therein required of Syndicate, is seven million dollars.

"Now This Agreement Witnesseth: That in consideration of mutual promises the parties hereto agree, and the Subscribers severally agree with each other and with Syndicate Managers, as follows:

"1. From time to time on calls made by Syndicate Managers and to such parties as shall be specified in such calls, the subscribers, severally and respectively, will pay to Syndicate Managers such sums in cash or in five per cent notes of the Transit Company due 1st November, 1904, at par, with interest, as shall be called by Syndicate Managers, but in the aggregate not exceeding their respective subscriptions hereunder.

"2. Subscribers form a Syndicate for the purpose of performing and carrying out said Tripartite Agreement. Each subscriber shall indicate opposite his name the total sum of his subscription on account of the whole Syndicate obligation hereunder, and the several subscribers shall be called upon to make payments in respect to their several subscriptions only ratably, according to the respective amounts thereof, but each subscriber shall be so responsible to the full extent of his undertaking, regardless of performance or non-performance by any other subscriber.

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"When, and as requested by Syndicate Managers and without reference to the receipt or to the possession hereunder by Syndicate Managers or by the subscribers of any bonds or stock, each subscriber will make any and all payments, and will perform all his undertakings of this agreement, and will do all things which by Syndicate Managers shall be deemed desirable to do in the accomplishment of the purposes of this agreement.

"Nothing herein contained or otherwise shall constitute the parties hereto partners, or shall render any one of the subscribers liable to contribute more than his several proportionate amount as herein provided, or shall prevent any of the parties from contracting with each other with reference to any of their respective interests.

"3. In case of any failure of any subscriber to make any payment called for or to perform any of his undertakings hereunder, Syndicate Managers in their sole and exclusive discretion may exclude such subscriber from all interest in the Syndicate; and in their discretion and in such manner as they may deem proper, without any proceeding, either at law or in equity, they may dispose of such subscriber's participation hereunder or of any interest or right of such subscriber hereunder, or under said proposed contracts; but, nevertheless, such subscriber in default shall be responsible to Syndicate Managers for the benefit of the other subscribers hereto for all damages caused by any failure on his part. At any public sale under this article of any interest or right of any subscriber, Syndicate Managers, or any party hereto, may become purchaser for their or for his own benefit, without accountability.

"4. Brown Brothers & Co., as Syndicate Managers, shall have the power and authority, from time to time, in such manner and on such terms as from time to time, either generally or in special cases, they may deem expedient:

"(1) To do and perform any and all acts required to be done by Syndicate under and pursuant to the terms of said Tripartite Agreement and said plan, and to make and execute any and all contracts in or about the premises which Syndicate or subscribers personally might or could do.

"(2) To receive all the securities which, under said Tripartite Agreement and plan, will be acquired by Syndicate, and to deposit all shares of common stock of the United Railways Company of St. Louis which shall be so received or required, for the term of five years, with voting trustees, to be by them appointed, under such voting trust agreement as they may deem expedient and may direct.

"(3) To hold, manage and sell for Syndicate account any and all bonds, stocks, certificates and securities received or acquired by Syndicate under the terms of said Tripartite Agreement and plan, at such prices and on such terms as to credit, security or otherwise, as they may deem expedient.

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"(4) During the term of this agreement to acquire by purchase, at public or private sale, with funds which they may derive from the sale of any of the original Syndicate assets, bonds, shares of stock, certificates and securities, or bonds, shares of stock, certificates or securities, of like character to those originally belonging to the Syndicate, with power to sell all or any part of such reinvestments and again similarly to reinvest the proceeds of such sales: Provided, however, that at no time shall this power be exercised to such extent as shall entail upon any of the subscribers any personal obligation to pay for such newly acquired assets, it being intended that the power to purchase shall be limited to a use of the assets originally acquired and the proceeds of their conversion and reconversion. In no event shall the Subscribers by reason of such purchases be rendered liable for an amount beyond that of their respective subscriptions.

"(5) All assets of the Syndicate and all net proceeds resulting from sales of any part thereof, or from any other transaction of Syndicate Managers therewith for account of the Syndicate under any of the provisions hereof, shall be applied by Syndicate Managers as follows:

"(1) To the payment of any and all expenses and obligations incurred by Syndicate Managers under any provision of this agreement.

"(2) To Syndicate Managers shall be paid as compensation for their services in securing and underwriting of the plan and Tripartite Agreement aforesaid, and subscription to this agreement and advice in the management of the property of the United Railways Company of St. Louis during the life of this Syndicate, voting trust certificate or certificates representing 15,000 shares of the common stock of the United Railways Company of St. Louis acquired and to be acquired under said agreement and plan.

"(3) In re-payment to the subscribers (so far as the same may be sufficient for that purpose) of all sums by them respectively paid to Syndicate Managers pursuant to Article First; such repayment to be made to the subscribers ratably.

"(4) One-fifth of any residue of such stocks and net proceeds remaining after payment in full of all sums payable under clauses (1), (2) and (3) of this article, shall be retained by and shall belong to Syndicate Managers for their own use as compensation for their services in forming and managing the Syndicate and selling the securities; and the remaining four-fifths of such residue shall be distributed by Syndicate Managers among the subscribers ratably, according to their respective interests. In ascertaining profits, unsold assets distributed to stockholders shall be taken at the price at which they were originally acquired.

"Such twenty per centum of any such residue shall be the only compensation to be received by Syndicate Managers for their services in the matter, saving the compensation specified under Clause (2); and in case there shall be no such residue, Syndicate Managers shall not receive any compensation for their services other than that so

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specified in Clause (2). Any stocks or other assets comprised in such residue may be sold by Syndicate Managers within the time fixed in this agreement, or may be distributed by them as they may deem expedient.

"Such application of such net proceeds and such distribution of such residue may be made by Syndicate Managers from time to time when and as they may deem expedient.

"All cash sums received by Syndicate Managers under any provisions of this agreement shall be held by them as bankers.

"6. Syndicate Managers shall issue to the subscribers suitable receipts for the respective payments made hereunder, and shall issue to the respective subscribers certificates of interest substantially in the form following. Such certificates of interest and all rights and obligations hereunder, of the respective subscribers, may be made transferable in the way and manner indicated hereinafter:

"No. \_\_\_\_\_

"Participation Certificate of Beneficial Interest in Purchase of Bonds of St. Louis Transit Company and Bonds and Stocks of the United Railways Company of St. Louis.

"Brown Brothers and Company, Managers of a Syndicate formed under an agreement bearing date the 10th day of October, 1904, for the purchase of certain stocks and bonds of the St. Louis Transit Company and the United Railways Company of St. Louis, under a Tripartite Agreement between the St. Louis Transit Company, United Railways Company of St. Louis and Syndicate Managers, dated September 27th, 1904.

"Hereby Certify, that .....  
has paid the sum of .....Dollars, (\$.....), being the first call of.....per cent upon an allotted subscription of.....Dollars, (\$.....), under the terms and provisions of the above mentioned agreement.

"Upon the payment of the amount of such subscription as and when called by Syndicate Managers, and in accordance with the terms of said Syndicate Agreement (to all the provisions of which this certificate and the rights of the holder hereof are subject) the registered holder hereof, upon the surrender of this certificate, properly endorsed, will be entitled to receive his pro rata proportion of cash or securities or both, in accordance with the terms of said Syndicate Agreement.

"This certificate is transferable only on the books kept for that purpose at the office of Brown Brothers & Company, in the City of New York, by the above named beneficiary or his agent duly authorized.

"No assignment of transfer of any interest hereunder, or issuance of new certificate to an assignee, shall release the original subscriber from full liability for his subscription.

"Payments upon calls as made must be endorsed hereon.

"New York City, ..... ,1904, .....

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"And, upon the back of each such certificate, shall be a form of assignment substantially as follows:

"For Value Received, ..... Hereby Sells, Assigns and Transfers unto all right, title and interest in the subscription represented by the within certificate, and subject to all the terms thereof, and does hereby irrevocably constitute and appoint ..... attorney, with full power of substitution in the premises, to transfer this certificate on books kept for that purpose by Brown Brothers and Company, 59 Wall Street, New York.

"Witness: .....

Dated ..... day of ..... 190..."

"7. The Syndicate shall continue until the 10th day of October, 1905, but may be extended beyond that date by the Syndicate Managers, provided such extension shall not exceed one year after the said 10th day of October, 1905. Syndicate Managers may, however, in their discretion, at any time, terminate this agreement upon such notice to the subscribers as they may deem proper.

"8. Syndicate Managers shall be the sole and final judges as to whether at any time it is to the interest of the Syndicate to proceed further under this agreement, or under said proposed proceedings thereunder. In such event all the stocks and other contracts; and whenever they may deem expedient, they may abandon the objects contemplated in this agreement and said proposed contracts, and all proceedings thereunder. In such event all the stocks and other assets by them acquired hereunder and then held for account of the Syndicate, and the proceeds of such stocks and other assets, shall remain charged with the payment of all expenses and liabilities by them incurred hereunder, and shall be applied in the way and manner indicated in the Fourth Article in clauses (1), (2), (3) and (4).

"9. Syndicate Managers shall have authority, from time to time, and at any time, to incur such expenses as they may deem proper in carrying out or in endeavoring to carry out this agreement or said proposed contracts, or in doing any act or thing which they may deem to be in the interest of the Syndicate, and they shall have power and authority in their sole and absolute discretion, finally to fix and to pay all compensation of depositories, brokers, agents, counsel and others; and in the expense account may be included broker commissions as usually paid on all purchases and sales; but Syndicate Managers shall not charge any brokerage for themselves additional to the amount herein provided.

"10. Syndicate Managers shall have the sole direction and management of the Syndicate during the term hereof. During said term they shall have the right to the exclusive custody of the assets held hereunder. The enumeration of specific powers in this agreement shall not be construed as in any way limiting any general power intended to be conferred upon, or to be reserved to, Syndicate Managers; it



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being intended to reserve to them, and there are expressly conferred upon them in addition to the general and specific powers recited herein, such other general and specific powers which, from time to time, they may deem necessary in order fully and effectually to carry out what they may deem to be the purposes of this agreement, and of this Syndicate, whether or not said purposes be herein expressed.

"Syndicate Managers, in their discretion, may submit to the subscribers any proposed change or modification of this agreement, and when assented to in writing by a majority in interest of the subscribers, any change or modification so submitted by them shall become a part of this agreement, and shall be binding upon all of the subscribers and those claiming under them, or each of them.

"Syndicate Managers shall not be liable for any error of judgment or for any mistake of law, or of fact, nor shall they be liable for any act or omission while endeavoring in good faith to carry out their purposes according to their judgment. No obligation or liability in addition to those herein expressed shall be applied against them. In no event shall they be responsible for the re-payment to the subscribers of the sums by them paid under any article hereof; but said sums shall be repayable only as herein provided out of any stocks or other assets applicable to such payment, under the provisions of this agreement.

"11. Syndicate Managers may become subscribers hereto. As such subscribers they shall be liable for any subscriptions made by them, and shall be entitled in all respects so the same rights and benefits as other subscribers. They may sell any stocks or other assets by them held hereunder to any other subscriber, and any such other subscriber may make any purchase from any Syndicate Manager.

"From time to time Syndicate Managers may offer, on such terms as they may deem expedient, to sell any such assets to subscribers severally and ratably, in sums proportionate to their respective Syndicate subscriptions, and in any such offering they may provide for the disposition of any untaken stocks or other assets in such way as they may deem expedient. In any offering Brown Brothers and Company, as Syndicate Managers, shall be entitled, the same as other subscribers, to the benefits of such offering, and to purchase their ratable amount of the assets so offered, and to hold the same without further accountability.

"12. This agreement shall bind, and shall be for the benefit of, the parties hereto and of their respective executors and administrators.

"All rights and powers of Brown Brothers & Company hereunder shall vest in such firm, as, from time to time, constituted, without further act or assignment.

"13. Each subscriber shall set opposite his subscription herein an address to which notices, calls or other communications may be sent, and any notice, call or other communication addressed to any subscriber at the address so given, and either left at such address or

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mailed, shall be deemed actually given to such subscriber, and shall be sufficient for all the purposes hereof: If any subscriber shall fail so to furnish his address to Syndicate Managers, he shall not be entitled to any notice of calls or offers, or another notice hereunder, and he shall be deemed to assent to any action of Syndicate Managers.

"In Witness Whereof the parties of the first part have hereunto affixed their signatures, and the parties of the second part, at various dates, have affixed their subscriptions hereto, it being understood that, for convenience, this agreement may be subscribed in several parts, and copies, with like force and effect as if all the subscriptions were upon one part or copy thereof.

Signed, Brown Brothers & Co.

Name	Address	Amt. Subscription in Dollars
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## Memorandum.

"Readjustment of the Capital and Finances of St. Louis Transit Company and United Railways Company of St. Louis. In 1899 all the street railway systems of St. Louis, 293.48 miles (now 358.65) were purchased and consolidated by the United Railways Company of St. Louis (save the St. Louis and Suburban System, 28 miles), under a charter of the State of Missouri and a fifty year franchise of the City of St. Louis, which has still over forty-three years to run, or until April 12th, 1948.

## "Capitalization—United Railways Company of St. Louis:

## General First Mortgage 4 per cent Gold

Bonds: Issued .....	\$28,292,000	
Reserved for underlying liens .....	13,708,000	
Reserved for St. Louis & Suburban .....	3,000,000	\$45,000,000

## Preferred Stock:

In the hands of the public .....	11,755,900	
Owned by Transit Company and pledged by it .....	8,223,200	
In Treasury of Transit Company .....	4,100	
Reserved for Purchase of Underlying Companies .....	16,800	20,000,000

## Common Stock:

Reserved for Future Requirements, Betterments and Improvements .....	7,652,500	
Reserved for Acquisition of Outstanding Stocks and Underlying Companies .....	86,200	
In Treasury of Transit Company and pledged by it .....	17,261,300	\$25,000,000

## Total Capitalization of the United Railways Company .....

\$90,000,000

## Capitalization—St. Louis Transit Company:

## Three Year 5 per cent Collateral Trust

Notes, due November 1st, 1904 .....	\$5,776,000
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20 Year 5 per cent Refunding and Gold			
Bonds: Reserved for Improvements, but			
only to be issued after 1905, and then only			
in amounts not to exceed \$500,000 per			
annum .....	5,944,000		
Reserve for Above Notes .....	6,056,000		
In Hands of the Public .....	8,000,000	\$20,000,000	
Capital Stock:			
Reserve for Future Requirements .....	2,735,700		
Issued and in Treasury of Company .....	3,000		
Issued and in the hands of Public .....	17,261,300	20,000,000	
Total Capitalization of St. Louis Transit			
Company .....		\$40,000,000	
Capitalization of both Companies .....			
		\$130,000,000	

## Lease.

"The United Railways Company of St. Louis (hereinafter called Railways Company), is leased to the St. Louis Transit Company (hereinafter called Transit Company), for a period of nearly forty years, or from October 1st, 1899, to the first day of April, 1939. The Transit Company is a corporation chartered by the State of Missouri. Under an ordinance of the City of St. Louis, approved on the 20th of March, 1899, it has power to acquire, lease and operate until the 18th day of March, 1939, any of the lines acquired by the Railways Company under the plan of consolidation.

"During the continuance of the lease, the Transit Company is obligated to pay a net annual rental of five dollars a share upon all of the preferred stock of the Railways Company now outstanding, or which may hereafter be issued by Railways Company with the consent of Transit Company, and among other things, to maintain, operate and keep the railways, property and premises, and every part of the same, in good repair, working order and condition, and supplied with rolling stock and equipment; to make any and all repairs and replacements, and any and all additions thereon, and reasonable improvements. In payment for such expenditures the Railways Company is obligated to issue to the Transit Company, at par, its first general mortgage bonds and preferred and common stocks.

"Under the lease, the Transit Company, among other securities, has received and would receive:

"\$2,877,000 First General Mortgage Four Per Cent Bonds of the Railways Company.

"\$8,227,300 Five Per Cent Cumulative Preferred Stock of the Railways Company.

"\$24,913,800 Common Stock of the Railways Company.

"Of this latter amount it has for expenditures heretofore made, received about \$17,261,300.

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"About \$17,261,300 Railways Company Common Stock and \$3,329,700 Railways Company Preferred Stock are pledged as collateral for the refunding and improvement mortgage.

"The \$2,877,000 four per cent bonds and \$4,893,500 of the five per cent Preferred Stock are pledged as collateral for the payment of the \$5,776,000 Three Year Collateral Trust Notes of the Transit Company outstanding, and upon payment of these Notes, are to be deposited with the Trustee of the Five Per Cent Refunding and Improvement Gold Bonds, as additional security for the same.

Refunding and Improvement Bonds.

"February last the Transit Company sold to a Syndicate \$8,000,000 of its Five Cent Refunding and Improvement Gold Bonds, for which there appears to be no market. \$6,056,000 more of these bonds are reserved for the retirement of the \$5,776,000 five per cent notes due November 1st, 1904.

Proposal.

"It is proposed that a syndicate shall be formed to readjust the Capitalization of the two companies and by that means provide the cash necessary for the payment of the Transit Company notes, and its current obligations, and, further, provide working capital. Provision is also to be made for the future needs of the Railways Company by means of securities to be reserved for improvements.

"Briefly, if the Transit Company shall cancel the present issue of \$20,000,000 Five Per Cent Refunding and Improvement Bonds and release the collateral under them, and in lieu thereof issue \$10,000,000 Five Per Cent 20 Year Improvement Bonds, guaranteed by the Railways Company, which guarantee shall in turn be secured by a mortgage upon all the property of the United Railways Company, then the Syndicate will endeavor to secure an exchange by which the present holders of \$8,000,000 of Refunding and Improvement Bonds will accept in lieu thereof \$8,000,000 of new Improvement Bonds and will make a contract with the Transit Company to buy all the securities in its treasury for \$7,000,000 in consideration of the Transit Company further agreeing to cancel and release, whenever called upon to do so by the Railways Company, the leasehold conveyed to it by the lease of the Railways Company, bearing date the 30th day of September, 1899.

"Simultaneously the Railways Company is to evacuate an agreement with the Syndicate, by which the former will demand from the Transit Company a release from its lease, bearing date 30th day of September, 1899, and will accept such release and will undertake the operation of all of the railroads so released to it by the Transit Company, and will also guarantee, and as between itself and said Transit Company assume and pay the \$10,000,000 Five Per Cent 20 Year Improvement Bonds of the Transit Company, and will convey and issue to Syndicate all of its common stock heretofore unissued by it,

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about \$7,652,500, in consideration of Syndicate depositing with a Trust Company, for the benefit of Railways Company, upon conditions to be named, 70,000 shares of its Preferred Stock.

Voting Trust.

"So as to protect and insure the proper management of the Railways Company during the next five years, and protect the value of the securities bought by the Syndicate, it is proposed that all the common stock received by the Syndicate shall be exchanged for Voting Trust Certificates, under an agreement covering a period of five years from the date of purchase, unless, in the discretion of these Trustees, it shall be deemed expedient to sooner dissolve the Voting Trust.

"Offer to St. Louis Transit Company Stockholders.

"Of the Common Stock of the Railways Company bought by the Syndicate and received from the Railways Company, the Syndicate will offer each individual holder of Transit Company Stock, on deposit of his Stock, within twenty days of the date of the offer, with a Trustee to be named, one Voting Trust Certificate for two shares of United Railways Common Stock for five shares of Transit Company Stock so deposited; it being part of the Syndicate agreement with Railways Company that any St. Louis Transit Company Stock so received in exchange by the Syndicate shall be delivered to the Railways Company. The amount of United Railways Common Stock required for this exchange is \$6,904,520 par value. Any stock not taken under the offer is to remain the property of the Syndicate.

Preferred Stock Agreement.

"Of the \$8,227,300 Preferred Stock of the United Railways Company included in the purchase from the Transit Company \$7,000,000 is to be deposited with a Trustee for account of the Railways Company, to be held for improvements or betterments, or otherwise, and sold only under instructions from the Board of Directors of the Railways Company, as appointed by the Voting Trustees.

Managers' Compensation.

"Of the Common Stock of the Railways Company acquired by the Syndicate from the Transit Company and the Railways Company, Managers are to retain 15,000 shares as compensation for their services in securing underwriting, carrying out plan of readjustment and managing the property of the Railways Company during the life of the Syndicate. In addition and for selling the securities acquired by the Syndicate they are to receive 20 per cent of profits from sales, after all expenses of management, etc., have been deducted.

General Mortgage Reduction.

"It is proposed that the \$3,000,000 General Mortgage Four Per Cent Bonds reserved in the treasury of the Railways Company for

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the purchase of the St. Louis Suburban shall be cancelled, thus reducing the general mortgage to \$42,000,000.

## Duration of Syndicate.

"One year, with power in the Managers to extend for a further period of one year.

## Result to Syndicate:

\$2,000,000 Transit Company 5 per cent Improvement Bonds	
at 85 .....	\$ 1,700,000
\$2,887,000 Railways Company 4 per cent Mortgage Bonds	
at 77½ and interest .....	2,268,035
\$1,227,300 Railway Company 5 per cent Preferred Stock at 50 .....	613,650
Common Stock, Railways Company .....	\$24,913,800
Less Amount for Transit Stockholders .....	6,904,520
Less Commission Stock .....	1,500,000
	<u>8,404,520</u>
	\$16,509,280
\$16,509,280 Common Stock at 17.14 less 2½ per cent	2,418,315
	<u>\$ 7,000,000</u>

## Disposition of Proceeds:

For Payment of 5 per cent Notes .....	\$ 5,776,000
To Write Down Assets .....	369,000
For Paving Required by City .....	205,000
For Current Liabilities .....	361,000
For Working Capital .....	289,000
	<u>\$ 7,000,000</u>

## Ownership of Stock:

Preferred Stock in Hand of Public .....	\$11,755,900
Common Stock in Hands of Public .....	6,904,520
	<u>\$18,660,420</u>

## Owned by Syndicate, including Commission Stock:

Preferred Stock .....	\$ 1,227,300
Common Stock .....	18,009,280
	<u>\$19,236,580</u>

## New Capitalization.

	Authorized.	With Trustee and in Treasury.	Outstanding.
Bonds:			
Underlying Liens .....			\$13,688,000
General Mortgage 4 per cent Bonds			
of which \$12,708,000 are Reserved			
for Underlying Liens .....	\$42,000,000		28,292,000
Improvement 5s .....	10,000,000		10,000,000
Preferred Stock .....	20,000,000	7,016,800	12,983,200
Common Stock .....	25,000,000	86,200	24,913,800
	<u>\$97,000,000</u>	<u>\$7,103,000</u>	<u>\$89,877,000</u>

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## Fixed Charges:

On Underlying Liens .....	\$ 754,400	
On General Mortgage 4s .....	1,131,680	
On Improvement 5s .....	500,000	
		\$2,386,080
Dividend on \$12,983,200 Preferred Stock, Cumulative, but not a Fixed Charge .....		649,160
		\$3,035,240

The Tripartite Agreement was submitted to the stockholders of the Transit Company at a special meeting held October 19, 1904, at which the following proceedings were had:

"The secretary then read the call for the meeting as contained in the notice hereinbefore set forth, whereupon Mr. H. S. Priest submitted for the consideration and action of the meeting, the following resolutions, to-wit:

"Whereas, on the 30th day of September, 1899, this company entered into a contract of lease with the United Railways Company of St. Louis, by which it acquired, for a term of thirty years, the right to operate the properties of the lessor, and immediately thereafter entered upon the operation of the properties, pursuant to the terms of said lease; and,

"Whereas, making the improvements, betterments and additions to the demised property as required by the covenants of the lease, the payments of rentals therein provided for, and in the operation of the property, this company has contracted an indebtedness largely in excess of its available resources; and,

"Whereas, in order to pay an indebtedness then due on the first day of November, 1901, this company authorized an issue of \$6,000,000 of three year five per cent collateral trust notes secured by a pledge of the Mercantile Trust Company of St. Louis of \$2,877,000 United Railways Company four per cent general mortgage bonds, and 48,935 shares of United Railways Company five per cent preferred stock, which it had acquired for betterments and improvements made upon the property under the terms of the lease aforesaid, of which authorized issue of collateral trust notes \$5,776,000 were issued and sold and mature on November 1st, 1904; and,

"Whereas, the indebtedness of this company continued to increase, so that on June 17th, 1903, by authority and direction of a convention of its shareholders, it was determined to issue \$20,000,000 five per cent twenty-year refunding and improvements bonds for the purpose of paying the then existing indebtedness, provide for the payment of the above collateral trust notes and create a resource for other improvements and betterments upon the leased property which it had covenanted to make in the aforesaid lease, which bonds

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were to be secured by a deposit of the bonds and stock covered by the collateral note pledge and 33,297 shares of the preferred stock of the United Railways Company, and 172,613 shares of United Railways Company common stock, together with a mortgage of its leasehold and the guaranty of the United Railways Company; and,

"Whereas, by the indenture of trust securing the aforesaid issue of bonds, it was provided that \$8,000,000 were to be immediately certified and delivered to this company, which bonds were so delivered to this company and sold, but the amount realized therefrom was not sufficient to meet all the financial requirements of this company; and,

"Whereas, this company has been unable to sell the \$6,056,000 of bonds reserved by the above indenture of trust, to pay off the collateral notes, for an amount which will enable it to meet the said collateral trust notes at maturity and has been unable to secure an exchange of the said reserved bonds for the collateral trust notes, by reason whereof the reserved bonds are unavailable and valueless to accomplish the purpose for which they were reserved; and,

"Whereas, this company is without financial resources, other than the bonds and stocks pledged as hereinbefore stated, with which to meet its indebtedness, and has no resource wherewith to make improvements, additions and betterments required of it by the above lease; and,

"Whereas, it is proposed to issue \$10,000,000 of bonds, to be guaranteed by the United Railways Company, of St. Louis, and its guaranty secured by a mortgage upon all of its property next in rank of lien to that of its general mortgage, for the purpose of exchanging \$8,000,000 of the proposed issue at par for the \$8,000,000 outstanding of the authorized issue of \$20,000,000 refunding and improvement bonds, and to cancel all of the issued and unissued refunding and improvement bonds and release the indenture of trust securing the same, and thereby release the stocks and bonds pledged under the refunding and improvement mortgage; and,

"Whereas, \$2,000,000 of the proposed \$10,000,000 of bonds, together with the stocks and bonds released from the lien of the refunding and improvement mortgage, and those remaining under the collateral trust note pledge, will enable this company to contract with the United Railways Company for the guaranty of its proposed issue of \$10,000,000 of bonds, and for a mortgage to secure such guaranty as above stated, and for a surrender of the lease, which has become more burdensome than this company can bear, and a sale of these securities to pay off its collateral note indebtedness; and,

"Whereas, on the 27th day of September, 1904, concerning the said premises, this company, the United Railways Company of St. Louis, and Brown Brothers & Company, as Syndicate Managers, entered into the following contract: . . .

"Now, therefore, be it resolved as follows:

"First, that the tripartite contract made and entered into by and between this company, the United Railways Company of St. Louis



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and Brown Brothers & Company, as Syndicate Managers, as above set forth, be and the same is hereby approved, ratified and confirmed.

"Second. Resolved, that this company make an issue for the purpose hereinbefore recited, its Improvement Bonds, payable to bearer, or to the registered holder thereof, for the aggregate amount of \$10,000,000, which bonds shall bear date October 1, 1904, payable twenty years thereafter, to be of the denomination of \$1000 each and to bear interest at the rate of five per cent per annum, and to be substantially in the following form, to-wit: [Here follows the form of the bonds.]

"And be it further resolved that the directors and officers of this company be and they are hereby given full and complete power to do everything in, of and concerning the premises which may appear to them needful or convenient to be done."

One hundred sixty-two thousand one hundred and seventy-five votes were cast, of which Brown Brothers & Company, as proxies, cast 155,127, Murray Carleton, as proxy, 6,749, and 254 by various other parties.

At a meeting of the stockholders of the United Railways Company held on October 20, 1904, the following proceedings were had:

"The secretary then read the call for the meeting as contained in the notice hereinabove set forth, whereupon, Mr. H. S. Priest submitted for the consideration and action of the meeting the following resolutions, to-wit:

"Whereas, this company by the direction and authority of its stockholders and directors has heretofore guaranteed an issue of \$20,000,000 of refunding and improvement bonds authorized and agreed by the St. Louis Transit Company; and,

"Whereas, \$8,000,000 of said bonds have been sold by St. Louis Transit Company and are now outstanding; and,

"Whereas, said Transit Company has authorized an issue of \$10,000,000 of its bonds called 'Improvement Bonds' to be used for the purpose of exchanging \$8,000,000 thereof for the said \$8,000,000 of outstanding refunding and improvement bonds, the remainder to be used for the purpose of paying in part an issue of collateral trust notes made by said Transit Company, maturing November 1st, 1904, provided this company was guaranteed the said proposed issue of improvement bonds and secured its guaranty thereof by a mortgage upon all of its property next in rank of lien to its general mortgage; and,

"Whereas, the said Transit Company, this Company and Brown Brothers and Company, as Syndicate Managers, entered into the following contract, namely: [Said contract referred to—Tripartite Agreement—is set out above.]

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"And whereas, it is to the interest and for the benefit of this company to make the said contract and guarantee the said bonds, and to secure its guaranty by a mortgage or deed of trust as aforesaid;

"Therefore, be it Resolved,

"First. That the said contract made and entered into by and between this company, the St. Louis Transit Company and Brown Brothers and Company, as Syndicate Managers, as set forth, be and the same is hereby approved, ratified and confirmed.

"Second. Resolved, that this company guarantee, for the purpose hereinbefore recited, and under the circumstances hereinbefore recited, the said authorized issue of ten million dollars of improvement bonds of the St. Louis Transit Company, which bonds shall bear date, October 1st, 1904, to be payable 20 years thereafter, and to be of the denomination of \$1,000, and to bear interest at the rate of 5 per cent per annum, and to be substantially in the following form:

....

"And be it further resolved that this company make its mortgage in substantially the following form to secure its guaranty endorsed upon said bonds, viz: . . .

"Third. And be it further resolved that the directors and officers of this company be and they are hereby given full and complete power, authority and direction to do everything in or concerning the premises which may appear to them needful or convenient to be done."

One hundred sixty-three thousand three hundred and fifty-two shares of preferred stock and 172,613 of the common stock, a total of 335,965 shares, were voted in favor of these resolutions and none against, and they were declared adopted.

No other or further action was taken by the stockholders of either company than as above set out.

At a meeting of the board of directors of the Transit Company held October 20, 1904, the following proceedings were had:

"St. Louis Transit Company.

"Office of the St. Louis Transit Co.

"St. Louis, Mo., Oct. 20, 1904.

"A special meeting of the Board of Directors of the St. Louis Transit Company was held this day at the hour of 2:15 o'clock at the office of the company, Room 618 Security Building, St. Louis, Mo., pursuant to notice duly given, at which were present Mr. Murray Carleton, president, and the following named directors:

"A. D. Brown, James Campbell, Louis A. Cella, F. E. Marshall, H. S. Priest, Robert McCulloch, Geo. L. Edwards. Absent: C. H. Spencer and Eugene Delano. Mr. E. H. Conrades was also present.

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"The president stated to the board that at the meeting of the stockholders held on October 19, 1904, the resolutions presented at said meeting (a copy of which are embraced in the minutes of said meeting) were carried in the affirmative by the following vote: 162,175 shares voted in favor thereof and none against.

"On motion of Mr. A. D. Brown, duly seconded by Mr. James Campbell, the following resolution was unanimously adopted:

"Resolved, That in pursuance of the consent and direction given to the stockholders of this company at their meeting duly called and held on the 19th day of October, 1904, the board of directors hereby authorizes and directs the issue of Improvement Bonds of this company to the amount of \$10,000,000 par value, in the form this day authorized by the stockholders of the company, and further authorizes, empowers and directs the president or vice-president and secretary to duly sign and execute the said bonds, and to do any and every other thing requisite or necessary to be done in order to make said bonds effective, and further, to carry into force an agreement made and entered into by and between this company, the United Railways Company of St. Louis, and Brown Bros. & Company as Syndicate Managers, ratified and approved at the said meeting of the shareholders as aforesaid.

"There being no further business before the meeting, the same was, on motion duly seconded, adjourned.

"MURRAY CARLETON, President.

"JAMES ADKINS, Secretary."

On October 26, 1904, Murray Carleton, as president of the United Railways Company, made a formal demand in writing on the St. Louis Transit Company under Article I of the Tripartite Agreement for the surrender of the lease, and on the same day the release was ordered by the board of directors and subsequently a deed of release was duly executed.

The preliminaries being now arranged and the lease surrendered, the Transit Company at midnight of October 31, 1904, delivered possession of the leased property to the United Railways Company and from that hour the United Railways Company undertook the operation of the street car lines. The Transit Company did no further business. In the execution of the Tripartite Agreement all of its property of every kind and character was turned over to the United Railways Company and the Syndicate. Many suits for personal injuries were then pending, but no provision was made for claims

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of this character. There was no breach of the lease and the satisfactory condition of the leased property is shown by the following letter of Murray Carleton, the president:

"The United Railways Company of St. Louis, Mo.  
Office of President.

"St. Louis, Mo., November 14, 1904.

"Messrs. F. S. Smithers & Co.,

"Messrs. Spencer, Trask & Co.,

New York City, N. Y.

"Gentlemen: .

"In reply to your inquiry touching the physical condition of the property of the United Railways Company of St. Louis, and its financial condition under the readjustment of the capitalization of the St. Louis Transit Company and the United Railways Company, I submit the following:

"Physical Condition.

"The St. Louis Transit Company, during 1902 and 1903, and the early part of 1904, expended large sums of money for betterments, construction and equipment, to prepare itself to carry effectively and economically the largely increased traffic incident to the Louisiana Purchase Exposition.

"The above important expenditures inure entirely to the benefit of the United Railways Company. I am, therefore, of the opinion, notwithstanding the increased service required of it, that the condition of the track and equipment is good. The company's power plants have been fully maintained, and a detailed report, now being prepared, will, I think, show that no important additions need to be made to these plants for several years to come. I believe, also, that the company can maintain its track and equipment out of earnings for several years to come with little, if any, recourse to capital expenditure.

"Financial Condition.

"The balance sheet of November 1st, 1904, shows a surplus over all current and accrued liabilities of \$633,259.66—\$288,714.47 of which is represented by material and supplies on hand, leaving an actual cash surplus of \$344,545.19; in addition to which the company has \$7,000,000 of its preferred stock in the hands of trustees for future betterments and improvements.

"For your further guidance, I submit a statement of the actual gross and net earnings of the St. Louis Transit Company, and of the United Railways Company for 1902, 1903 and 1904 (two months of the last year being estimated); also an estimate of the gross and net earnings for 1905, which I feel is a conservative one, and within the power of the Company to realize.

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Respectfully yours,

(Signed) Murray Carleton,  
President.

## Official Returns and Estimates.

"The following figures represent actual earnings reported by the company for the respective years, with fixed charges based upon the readjustment of the capitalization of the company:

	1902	1903
Gross Earnings and other income .....	\$6,452,218.90	\$7,295,847.38
Operating Expenses and Taxes .....	3,967,721.32	4,513,514.57
	<u>\$2,484,497.58</u>	<u>\$2,782,332.81</u>
Interest on Underlying Liens .....	\$ 754,400.00	\$ 754,400.00
Interest on \$28,292,000 First General Mortgage 4s: 080.00, \$1,131,680.00, \$1,886,080.00	\$1,131,680.00	\$1,886,080.00
Surplus after Charges as above .....	\$ 598,417.58	\$ 896,252.81

"The following figures are based upon careful and conservative estimates, the earnings for 1904 being estimated for the last two months of the year. The estimates for 1905 are based upon earnings prior to 1904, as during the present year the St. Louis Exposition traffic has increased the earnings considerably beyond normal proportions:

	1904	1905
Gross Earnings and other income .....	\$9,810,150.00	\$8,334,872.00
Operating Expenses and taxes .....	5,591,785.00	4,750,877.00
	<u>\$4,218,365.00</u>	<u>\$3,583,995.00</u>
Interest on Underlying Liens .....	\$ 754,400.00	\$ 754,400.00
Interest on \$28,292,000 First General Mortgage 4s: 886,080.00, \$1 131,680.00, \$1,886,080.00.	\$1,131,680.00	\$1,886,080.00

	1904	1905
Surplus after Charges as above .....	\$2,332,285.00	\$1,697,915.00

"The City of St. Louis is the fourth-largest city in the United States, and has always been prominent for its conservatism. It is the largest railroad center, and the third-largest commercial and jobbing center, in the United States. During the eight years from 1896 to 1903, inclusive, the assessed valuation of real estate has increased over 21 per cent.

"The Southwestern country, which is immediately tributary to St. Louis, has in recent years shown very remarkable and substantial growth. It has been the field of over one-half the railroad construction of the past three years, and the continued increase of population and wealth will contribute to the prosperity of St. Louis and its interests."

The contention of the United Railways Company is that it assumed and paid obligations of the Transit Company in excess of the property received, and two statements were offered in evidence,\* for the purpose

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of showing the assets taken and liabilities claimed to have been assumed, as follows:

"Liabilities Assumed and Assets Required from St. Louis Transit Company upon the Surrender of its Lease to the United Railways Company of St. Louis, October 31, 1904.

**LIABILITIES.**

St. Louis Transit Company Improvement, 20-year 5 per cent Gold Bonds guaranteed by United Railways Co. ....	10,000,000.00
Bills payable .....	735,221.00
Accounts payable—audited vouchers .....	324,858.11
Unclaimed wages .....	4,210.40
Trust fund certificates—employees' savings deposit .....	6,445.00
Employees' badge deposit .....	288.65
Outstanding bank checks .....	402.55
Matured bonds and coupons .....	105,380.00
Dividends accrued on United Railways Company preferred stock .....	54,096.66
Interest accrued on funded debt .....	627,860.00
Outstanding tickets .....	14,987.50
Sundry creditors .....	14,309.73
Sundry accrued and reserve accounts .....	33,422.94
<b>Total liabilities assumed .....</b>	<b>\$11,921,482.54</b>

**ASSETS.**

Preferred capital stock of United Railways Company of St. Louis (70,000 shares) held by The National Bank of Commerce in St. Louis, Trustee .....	\$7,000,000.00
Capital stock of the Louisiana Purchase Exposition Company, par-value \$210,000.00 ....	2,100.00
Securities due from the United Railways Company of St. Louis for construction and equipment:	
Expenditures .....	1,118,876.57
Material and supplies on hand .....	286,614.47
Cash .....	614,015.25
Brown Brothers & Co., Syndicate Managers ..	1,224,000.00
Bills receivable .....	86,556.73
Accounts receivable .....	48,247.07
Conductors' collections .....	559.50
City of St. Louis .....	2,007.33
United States Government—P. O. Dept. ....	11,044.40
The Fidelity & Casualty Co., of N. Y. ....	75,000.00

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Cash on Deposit for Payment of Matured	
Bonds and Coupons .....	105,380.00
Sundry debtors .....	17,206.92
Sundry accounts paid in advance .....	82,010.53
	<u>\$10,673,618.77</u>
Excess of liabilities over assets acquired by the	
United Railways Company of St. Louis,	
October 31, 1904, upon surrender of Transit	
Company's lease .....	
	<u>\$ 1,247,863.77</u>

The second is as follows:

"Liabilities of the St. Louis Transit Company Paid and Assumed and Assets Acquired From Said Company by United Railways Company of St. Louis.

Exhibit.	Liabilities.
A	St. Louis Transit Company Improvement 20-year 5 percent Gold Bonds guaranteed by United Railways Co. ....
	\$10,000,000.00
B	Bills Payable and Accrued Interest .....
	743,909.00
C	Accounts Payable — Audited Vouchers .....
	324,858.11
D	Employees' Trust Fund Certificates .....
	6,445.00
E	Outstanding Checks of St. Louis Transit Company ..
	402.55
F	Matured Bonds and Coupons .....
	105,380.00
G	Interest Accrued on Funded Debt .....
	627,860.00
H	Injuries and Damages Claims Paid by United Railways Co. of St. Louis on which Appeal Bonds had been Given .....
	273,058.03
	(Amount of said Appeal Bonds \$583,626.84.)
I	Unclaimed Wages .....
	4210.40
"	Employee's Badge Deposits .....
	288.65
"	Dividend Accrued on 129,832 shares Preferred Stock of United Railways Company of St. Louis .....
	54,096.66
"	Outstanding Tickets of St. Louis Transit Company ..
	14,987.50
"	Sundry Accrued and Reserved Accounts .....
	1,804.20
J	Sundry Creditors .....
	14,249.73
	<u>Total Liabilities Assumed \$12,171,549.92</u>

Exhibit	Assets.
K	Capital Stock of the Louisiana Purchase Exposition Co. Par Value \$210,000.00 .....
"	Expenditures Made on Property of United Railways Co. of St. Louis by St. Louis Transit Co. not paid by United Railways Co. October 31, 1904 .....
	1,118,876.57
"	Material and Supplies on hand .....
	286,614.47
"	Cash .....
	614,015.25
"	Brown Bros. & Co. Syndicate Managers .....
	1,224,000.00

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" Conductors' Collections .....	559.50
" City of St. Louis .....	2,007.33
" United States Government—P. O. Dept. ....	11,044.00
" The Fidelity & Casualty Co. of N. Y. ....	49,500.00
L Cash on Deposit for payment of Matured Bonds and Coupons .....	105,380.00
M Notes Receivable and Interest Accrued to Oct. 31, 1904 .....	88,479.97
N Sundry Debtors .....	17,206.92
O Sundry Accounts Paid in Advance .....	82,010.53
P Accounts Receivable .....	44,251.91

\$ 3,643,946.85

"September 30th, 1909."

Exhibit "H" referred to in this statement, covering \$273,058.03, is entitled as follows:

"Statement of St. Louis Transit Company damage claims paid by United Railways Company of St. Louis from November 1st, 1904, to September 30th, 1909, for which bonds were given."

In the itemized statement of Exhibit "G" entitled, "Interest accrued on funded debt \$627,860," appears this item: "St. Louis Transit Company Improvements Bonds, \$10,000,000. 5 per cent \$41,666.66."

"These bonds were not authorized to be issued until October 20, 1904, and were to be assumed under the terms of the Tripartite Agreement by the United Railways Company.

The answer of defendant Transit Company is a general denial and a plea of champerty. The United Railways Company sets up the lease, the Tripartite Agreement and proceeds:

"And defendant, further answering, says, that on the \_\_\_\_\_ day of October, 1904, it requested the Transit Company to surrender to it, by proper instruments or conveyance of release, all and singular the property demised by the lease of September 30th, 1899, and the delivery, assignment and transfer to it of the possession of all said demised property, and all cash, bills receivable and other credits then owned or held by it as provided in the first paragraph of Article I of the agreement last mentioned, this defendant being thereto requested by Brown Brothers & Company, Syndicate Managers, as is provided by paragraph b of Article III., of said agreement last mentioned; and this defendant says that the said St. Louis Transit Company did thereupon, and pursuant to said agreement and said request make a con-



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veyance of release to all the property demised of the said lease of September 30th, 1899, and did, on the 31st day of October, 1904, deliver, assign and transfer to this defendant immediately possession of all said demised property, and all cash, bills receivable, and other credits then owned or held by it; and that thereupon this defendant did release, and fully acquit said Transit Company from all liability which had then accrued, or might thereafter accrue to it under and by virtue of the terms of the said lease; and this defendant did assume and undertake to pay all debts then contracted by said St. Louis Transit Company, for labor, materials and supplies rendered or furnished to said St. Louis Transit Company, as is provided by the said agreement of September 27th, 1904.

"This defendant, further answering, admits that, pursuant to the terms of said agreement, and for the consideration therein mentioned, the said St. Louis Transit Company did turn over to it, among other assets, the cash sum of \$614,015.25.

"But this defendant further avers that the amounts assumed and paid by it under the said agreement of September 27th, 1904, exceeded in value the assets acquired by it under said agreement from the said St. Louis Transit Company, including the said sum of \$614,015.25, by an amount approximating \$500,000."

The court below gave judgment in favor of the plaintiff for the sum of \$38,373.78, and defendants appealed.

The evidence in this cause has taken such a wide range and the record is so voluminous and confused that the sifting out of that which is material has imposed a great labor, aside from the examination of the vast array of authorities presented.

By stipulation the case was submitted in the court below on the record in the case of *Barrie v. United Railways Company*, the judgment here in suit being substituted for those in that case.

In the *Barrie* case, determined by the St. Louis Court of Appeals, 138 Mo. App. 557, the various legal propositions, now again advanced, were exhaustively discussed and the rulings of that court were approved by this court in the case of *Johnson v. United Railways Company et al.*, 247 Mo. 326.

From the view now taken of the case there can be no occasion to go over the ground again.

At the time of the execution of the lease between the United Railways Company and the Transit Company

on September 30, 1899, and up to October 31, 1904, the board of directors of both companies, consisting of eleven members, was composed, with one or two exceptions, of the same persons and Murray Carleton was president of both companies.

The Transit Company had no property, but was authorized to issue stock to the amount of \$20,000,000. It issued and exchanged 172,613 shares of its stock for a like number of shares of the common stock of the United Railways Company plus \$10 per share, thus obtaining a working capital of about \$1,900,000 and becoming the owner of a majority of the \$25,000,000 of the common stock of the United Railways Company.

After taking charge under the lease the Transit Company operated the street car lines of the City of St. Louis until midnight of the 31st day of October, 1904, when the United Railways Company again took possession and began their operation.

During the five years of its management the Transit Company became largely indebted and had outstanding in September, 1904, \$5,776,000 par value 5 per cent collateral trust notes, maturing November 1, 1904, and \$8,000,000 five per cent twenty-year gold bonds, called Refunding and Improvement Bonds. It had received from the United Railways Company under Clause One of the lease for betterments and improvements the following securities: \$2,877,000 par value United Railways 4 per cent general bonds and \$8,227,300 par value United Railways 5 per cent preferred stock.

All of these securities, as well as the 172,613 shares of United Railways Common stock and the leasehold, were pledged to secure the Collateral Trust Notes and the \$8,000,00 of Refunding and Improvement Bonds which were also guaranteed by the United Railways Company.

The Transit Company being without means to meet the payment of the Collateral Trust Notes maturing November 1, 1904, its president, Murray Carleton, on the 9th day of September, 1904, submitted a proposition in

writing to the mercantile Trust Company, which held the securities pledged as collateral, suggesting the issue by the Transit Company of \$10,000,000 of a new series of twenty-year bonds to be known as Improvement Bonds, \$8,000,000 of which should be exchanged for a like sum of the outstanding Refunding and Improvement Bonds and \$2,000,000 should be sold at not less than 85 cents on the dollar, together with so many of the securities of the Transit Company held by the Trust Company as collateral as will be necessary to provide for the principal of the notes due November 1, 1904, and certain requirements aggregating \$935,000, said requirements being for paving \$205,000, for writing down certain assets \$379,000, and for \$361,000 current liabilities unprovided for in the sale of the \$8,000,000 Refunding and improvement Bonds.

In addition to the "requirements" here mentioned the transit Company had other large liabilities, and many suits for personal injuries were pending, among them those in which the judgments here in suit were rendered. Claims of this character were so large an item of expense that it required 4½ to 5 per cent of the gross earnings to meet them and a special fund was set apart annually for that purpose.

The proposition submitted by the president of the Transit Company to the Mercantile Trust Company was approved by the board of directors of the Transit Company and formed the basis of the tripartite agreement entered into on September 27, 1904, by the Transit Company, the United Railways Company and Brown Bros. & Company, as Syndicate Managers.

There seems to have been some dissatisfaction with the scheme on the part of the stockholders of the Transit Company, and, to appease them, Brown Brothers & Company addressed to them the following letter:

"New York City, September 27, 1904.

"To the Shareholders of the St. Louis Transit Company:

"Conditioned upon the execution and accomplishment of a tripartite contract between the St. Louis Transit Company, The United Railways Company of St. Louis and a Syndicate, of which the undersigned are

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managers, and in accordance with the terms of a covenant therein contained between the United Railways Company of St. Louis and the undersigned, as said Syndicate Managers.

"First. The undersigned do hereby appoint the National Bank of Commerce in St. Louis as their agent, for and in their behalf, to accept and receive the deposit of the shares of stock of the St. Louis Transit Company, subject to the terms of this proposal, and to issue interim receipts therefor, and to receive applications, as hereinafter stated, for participation in said Syndicate.

"(The Transit Company's stock and applications for participation will be received by Messrs. Brown Brothers & Company, at their offices in New York, Philadelphia and Boston, for transmission, without expense to the depositor, to the National Bank of Commerce in St. Louis.

"Second. The shares of stock of the St. Louis Transit Company so deposited must be endorsed in blank under a power of attorney authorizing the transfer of same upon the books of the company, and so deposited with said bank on or before the 18th day of October, 1904; and the deposit must also be accompanied with the enclosed proxy, duly executed.

"Third. Upon and subject to the conditions herein before stated, the undersigned, as Syndicate Managers, will exchange with the owner, or his assigns, of the stock so deposited, two shares for the common stock of the United Railways Company of St. Louis for each five shares of the stock of the St. Louis Transit Company, the said United Railways Company's stock, however, to be represented by voting trust certificates issued under a voting trust agreement to be formed and made by the undersigned, with such terms and conditions as may seem wise to them, as managers, and shall endure for a period of five years from and after November 1st, 1904, unless sooner dissolved pursuant of the terms of such trust agreement.

"Fourth. The Syndicate, of which the undersigned are managers, has been organized to purchase certain bonds and stocks mentioned in said tripartite agreement, belonging to the St. Louis Transit Company, and upon a plan and terms heretofore agreed upon between Syndicate and Managers, after the consummation of which there will remain in the possession of the managers, as the property of the underwriters—

\$2,000,000.00 5 per cent Improvement Bonds 85 ..... \$1,700,000.00  
\$2,877,000.00 First General Mortgage 4 per cent Bonds of the

United Railways Company ..... 5,300,000.00  
12,273 shares of the Preferred Stock of the United Railways  
Company .....  
165,092.80 shares of the Common Stock of the United Rail-  
ways Company .....

At a total of ..... \$7,000,000.00

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"It is the desire of Syndicate Managers to afford such of the shareholders of the St. Louis Transit Company as shall deposit their stock, as hereinbefore provided, an opportunity to participate in such purchase of said bonds and stocks under the said Syndicate plan. This offer, is, however, entirely without any consideration, and purely voluntary on the part of Managers and Syndicate.

"The application of all such stockholders of Transit Company as, on or before Friday, October 7th, 1904, shall be made in accordance with the subjoined communication to the National Bank of Commerce in St. Louis, as agent for Syndicate Managers, for participation in said Syndicate purchase, will have the attentive consideration of Managers, and allotment upon such applications will be made as soon thereafter as practicable; but Managers may require any such applicant to give a guarantee of his financial responsibility, or security for the full amount of his application, and reserves the right to allot a lesser amount than that applied for.

"BROWN BROTHERS & COMPANY,  
"Syndicate Managers."

Participation certificates were subsequently issued to the stockholders of the Transit Company and they subscribed \$4,070,681.68 of the \$7,000,000 required to pay for the securities.

The tripartite agreement was approved by the board of directors of both companies and was submitted to the stockholders of the Transit Company at a meeting held on October 19, 1904, at which it was unanimously ratified by a vote of 162,175 shares of stock, of which Brown Brothers & Company, as proxies, cast 155,127, Murray Carleton, president of both companies, as proxy, 6794, and 254 were cast by various individuals.

On the following day the agreement was submitted to the stockholders of the United Railways Company and approved by a vote of 163,352 preferred shares and 172, 613 shares of common stock.

On the 26th day of October, 1904, Murray Carleton, as president of the United Railways Company, made a formal demand on the Transit Company for a surrender of the lease and the delivery of all cash, bills receivable and other credits, as specified in the tripartite agreement. Compliance with the demand was ordered by the board of directors and a deed of release was executed on the 29th day of October, 1904. The United Railways

Company thereupon took possession of all of the property of the Transit Company of every kind and character, excepting the securities sold to the Syndicate, including, among other things, material and supplies valued at \$286,614.47. By virtue of what right or authority this was done is not made to appear. There was no official action taken by the board of directors of the Transit Company in regard to the matter, and the stockholders, in ratifying the tripartite agreement, had agreed only to cancel the lease, surrender possession of the premises and to deliver up to the United Railways Company all cash, bills receivable and other credits then owned or held by it.

No breach of the lease had occurred and the leased property was in excellent condition. The United Railways Company then owed the Transit Company, \$1, 118,876.57 for betterments and improvements.

Mr. Adkins, the treasurer of the Transit Company, testified that all of the assets of the Transit Company were disposed of in carrying out the tripartite agreement.

At midnight of October 31, 1904, the Transit Company delivered up the leased property and the United Railways Company took charge of the operation of the street car lines. The Transit Company had no property left and did no further business.

How completely the Transit Company had been divested of its property is shown by the evidence of Murray Carleton, its president, who was asked:

"Q. And it also turned it back with all these additions and improvements? A. Yes, as far as they existed.

"Q. Turned over everything, didn't it, that it had? A. Yes.

"Q. And after October 31, 1904, Transit Company had no property whatever, did it, and has had no property since that date subject to a levy? A. I don't think it has any tangible property. Somebody has been looking for it, but has been unable to find it.

“Q. At least, the sheriff had not been able to locate anything? A. No, sir.

“Q. The United Railways Company took charge of all that property, and beginning with twelve o'clock October 31, 1904, it became a going concern, or an operating company, did it not? A. Yes, sir.”

It is plain from the face of the instrument that the purpose of the tripartite agreement, suggested by Murray Carleton, as he states, was to eliminate the Transit Company and put all of its property into the hands of the United Railways Company. Brown Brothers & Company were simply the manipulators. The agreement was predicated on their ability to organize a Syndicate to purchase the securities of the Transit Company. If they had not succeeded, the tripartite agreement would have failed. Nothing was sold to them by the Transit Company.

To carry out the provisions of Article II of the tripartite agreement a contract was entered into on the 10th day of October, 1904, between Brown Brothers & Company and the subscribers to a fund to purchase the securities of the Transit Company, “collectively called the Syndicate,” which recites among other things:

“And, whereas it is estimated under the tripartite agreement and plan aforesaid that the Syndicate will receive and retain for its own account the following bonds and stocks, to-wit:

“\$2,000,000 St. Louis Transit Company five per cent proposed Improvement Bonds.

“\$2,877,000 United Railways Company of St. Louis four per cent General Mortgage Bonds.

“\$1,227,300 (par value) United Railways Company five per cent cumulative Preferred Stock.

“\$18,009,280 (par value) United Railways Company of St. Louis Common Stock.

“And, whereas, the estimated aggregate amount of money required under the terms of the tripartite agreement on the part of the Syndicate to make payment of

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the aforesaid bonds and stocks, and to do the things therein required is seven million dollars."

The enumeration here given of the stocks and bonds to be acquired by the Syndicate does not embrace the whole amount of the \$8,227,300 of preferred stock agreed in the tripartite agreement to be sold by the Transit Company, with other securities, to Brown Brothers & Company for the sum of \$7,000,000. The Syndicate received \$1,227,300.00. and the remaining \$7,000,000, passed into the treasury of the United Railways Company. How and upon what consideration does not clearly appear.

This \$7,000,000 of preferred stock is listed among the assets received from the Transit Company in one of the statements introduced by defendants, but omitted from the other for some reason.

Under the terms of the tripartite agreement the \$289,000 remaining after satisfying the Collateral Trust Notes and the \$935,000 of "specific requirements" was to be paid to the Transit Company, or its president. What became of this sum is not shown.

It is called "working capital" in the agreement of October 10, 1904, just referred to, where the application of the \$7,000,000 to be paid for the securities is stated thus:

"Disposition of Proceeds:

"For payment of 5 per cent notes.....	\$5,776,000.00
To write down assets .....	369,000.00
For paving required by city.....	205,000.00
For current liabilities.....	361,000.00
For working capital.....	289,000.00

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"\$7,000,000.00."

Since, under the plans that were being perfected, the United Railways Company was to supersede the Transit Company as the operating Company and the Transit Company was to be retired altogether, it is reasonable to assume that this \$289,000 found its way into the treasury of the United Railways Company, although it is not listed



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among the assets received in the statement presented by the defendants.

To show what the United Railways Company had received from the Transit Company and what it assumed and paid the following was offered in evidence:

"Liabilities Assumed and Assets Required from St. Louis Transit Company upon the Surrender of its Lease to the United Railways Company of St. Louis, October 31, 1904.

**LIABILITIES.**

St. Louis Transit Company Improvement, 20-year 5 per cent Gold Bonds guaranteed by United Railways Co. ....	10,000,000.00
Bills payable .....	735,221.00
Accounts payable—audited vouchers .....	324,858.11
Unclaimed wages .....	4,210.40
Trust fund certificates — employees' savings deposit .....	6,445.00
Employees' badge deposit .....	288.65
Outstanding bank checks .....	402.55
Matured bonds and coupons .....	105,380.00
Dividends accrued on United Railways Company preferred stock .....	54,096.66
Interest accrued on funded debt .....	627,860.00
Outstanding tickets .....	14,987.50
Sundry creditors .....	14,309.73
Sundry accrued and reserve accounts .....	33,422.94
<b>Total liabilities assumed ....</b>	<b>\$11,921,482.54</b>

**ASSETS.**

Preferred capital stock of United Railways Company of St. Louis (70,000 shares) held by The National Bank of Commerce in St. Louis, Trustee .....	\$7,000,000.00
Capital stock of the Louisiana Purchase Exposition Company, par value \$210,000.00 ..	2,100.00
Securities due from the United Railways Company of St. Louis for construction and equipment:	
Expenditures .....	1,118,876.57
Material and supplies on hand .....	286,614.47
Cash .....	614,015.25
Brown Brothers & Co., Syndicate Managers	1,224,000.00
Bills receivable .....	86,556.73
Accounts receivable .....	48,247.07
Conductors' collections .....	559.50

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City of St. Louis .....	2,007.33
United States Government—P. O. Dept. . . . .	11,044.40
The Fidelity & Casualty Co., of N. Y. ....	75,000.00
Cash on deposit for payment of matured bonds and coupons .....	105,380.00
Sundry debtors .....	17,206.92
Sundry accounts paid in advance .....	82,010.53
	<hr/>
	\$10,673,618.77
Excess of liabilities over assets acquired by the United Railways Company of St. Louis, October 31, 1904, upon surrender of Transit Company's lease .....	<hr/>
	\$ 1,247,863.77

In this statement appears the item "Brown Brothers & Company, Syndicate Managers, \$1,224,000."

To what this relates is left to conjecture, but the inference must be that it was on account of the purchase price of the \$2,000,000 of Improvement Bonds specified in the tripartite agreement to be sold to Brown Brothers & Company. These bonds were the only items among the securities for which a definite price was fixed, and this was \$1,700,000. So far as shown, there was to be no other pecuniary transaction between the Transit Company and Brown Brothers & Company and the item above mentioned should be \$1,700,000 instead of \$1,224,000 or \$476,000 more than given.

These two amounts, \$289,000.00 and \$476,000.00, added to the total of assets received, increase the amount to \$11,438,618.77.

The United Railways Company pleads that the debts of the Transit Company assumed and paid by it exceeded the assets received. However, it made no agreement with the Transit Company to assume or pay anything. It agreed with Brown Brothers & Company to demand of Transit Company the surrender of the leasehold and the leased property and "immediately upon such surrender to enter into and upon the premises and the operation of said property and coincident therewith, as between itself and Transit Company, to assume the payment of the ten million dollars of the proposed Improvement Bonds guaranteed, as herein provided, by Railways Company, and

all debts contracted for labor, material and supplies rendered or furnished to Transit Company." Whatever the legal effect of this stipulation may be under the Statute of Frauds, it must be limited to the debts mentioned. There was no official action of the board of directors or the stockholders of the United Railways Company extending the undertaking.

The consideration for the agreement to assume the payment of the Improvement Bonds and the debts for material, labor and supplies must be found within the terms of the tripartite agreement.

Only two of the items mentioned in the statement can be held to relate to claims for labor, material or supplies; the others must be those which the United Railways Company claims to have paid without regard to the tripartite agreement, and these, if paid, were paid with assets taken from the Transit Company.

In the execution of the tripartite agreement every vestige of property belonging to the Transit Company, excepting the securities sold, went into the hands of the United Railways Company. No inventory was taken, no price fixed or agreed upon and no sale made or contemplated. As expressed by Murray Carleton, the president of the United Railways Company, "the tenant moved out and the landlord moved in," and took possession of everything, including material and supplies estimated at \$286,614.47.

According to Murray Carleton the Transit Company had no "tangible" property left after October 31, 1904.

Many damages suits for personal injuries were pending, and with reference to claims of this character Murray Carleton testified:

"Q. Well, you voted for and assisted in the distribution of these assets, didn't you? A. Why of course. I was very glad to vote for something that would release me from those obligations and pay the debts of the Transit Company.

"Q. Well I am talking now about the matter of distributing this stock among the shareholders of the

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United Railways Company. You knew as president of the United Railways Company when you participated in that deal that you were aiding the Transit Company, that is to say, that the United Railways Company was aiding the Transit Company, in placing itself beyond the reach of its creditors, isn't that true? A. Never had any such motive in mind.

"Q. Well, isn't that a fact that that was the result?

A. Well, I don't see it that way.

"Q. You knew by that action, however, that that would be the result, didn't you? A. As I have stated repeatedly, I had no concern whatever except as to the notes and fixed liabilities of the Transit Company. With these I was concerned, and with these used my best efforts and endeavor to see that they were discharged, and they were discharged and paid in full.

"Q. And you had no concern about people who had claims against the Transit Company, as to whether they were paid or not paid? A. None whatever.

"Q. And you didn't care anything about it? A. Not a particle."

This indifference of Mr. Carleton, who was president of both companies and the moving master spirit in the whole transaction, was shared by the members of the board of directors, since it appears that the general indebtedness of the Transit Company was not discussed in the meetings while these proceedings were pending.

That it was large is apparent from the answer of Mr. Carleton when asked to explain why it was that the securities of the Transit Company sold to the Syndicate had advanced in price so rapidly after the tripartite agreement had been carried out. He said it was because the property had gone into "strong hands," that the United Railways Company had property and no debts, while the Transit Company had debts and no property.

Notwithstanding the complete undoing of the Transit Company the United Railways Company, after October 31, 1904, continued to defend suits brought against the Transit Company.

As to this Murray Carleton testified:

"Q. Well, after October 31, 1904, and after the Transit Company had ceased to be a going concern and the United Railways Company continued the business, the United Railways Company through its officers and attorneys continued, did it not, to defend cases brought against the Transit Company, settle suits and claims, pay attorneys' fees and other expenses usually incident to litigation, did it not? A. Immediately after the United Railways Company took possession of this property, of course, this situation arose: As to certain suits or certain claims against the Transit Company we never had any policy, no fixed policy, as to how these things should be treated, but authorized the counsel of the company to treat those matters as in his judgment they should be treated and as they arose, not knowing anything about the merits of the case, or anything about it, and don't know of any particular case, and don't know now what has been done, but I know that on the request of the Transit Company certain moneys were paid out by the United Railways Company and charged to the account of the Transit Company."

It is shown that in pursuance of this plan the sum of \$273,058.03 was paid out by the United Railways Company between November 1, 1904, and September 30, 1909, and charged against the Transit Company, on account of damage suits against the Transit Company in which appeal bonds had been furnished by the United Railways Company.

What occasion there could be for such a charge in view of the fact that since October 31, 1904, the Transit Company had been out of business and apparently had no property, the United Railways Company alone can explain.

The evidence in this case shows that the United Railways Company took from the Transit Company a large amount of property far in excess of the claim of plaintiff in this case, for which it paid no consideration and to which it acquired no title, and placed it beyond the reach of the creditors of the Transit Company.

The Transit Company had the undoubted right to prefer one creditor to another, but it could not transfer the exercise of this right to the United Railways Company, so as to authorize that company to administer its assets.

The judgment of the court below should be affirmed and it is so ordered.

*Williamson, J.*, concurs in separate opinion, in which *Walker, C. J.*, and *Williams, J.*, concur; *Blair, J.*, dissents; *Graves, J.*, dissents in separate opinion, in which *Wpodson, J.*, concurs; *Goode, J.*, not sitting.

WILLIAMSON, J. (concurring).—The record in this case is exceedingly voluminous. It is made up, in large part, of the records in eleven other cases, which are thrown together in the abstract with little regard to system or relevancy. The index is a frank failure. After much labor, it is hoped that a fairly succinct statement of such facts as are essential to an understanding and a decision of this case has been obtained. It has not been thought necessary to deal with masses of figures, nor to do more than state the effect of documentary evidence, since all of those matters are very fully set out in the very exhaustive opinion of the learned Special Judge who writes the principal opinion.

On March 10, 1898, the Central Traction Company of St. Louis was duly incorporated, with a paid-up capital of one hundred thousand dollars. On July 10, 1899, by proper proceedings, its name was changed to United Railways Company of St. Louis. Thus one of the parties to this record was born. Upon changing its name, it increased its capital to forty-five million dollars—twenty-five million common stock and twenty millions preferred. Then it bought all but one of the street railways of St. Louis and was established in business.

On March 2, 1899, the St. Louis Transit Company was duly incorporated—capital three thousands dollars—and so a second party to this record was born. Shortly thereafter this capital stock was also increased, and then stood at twenty million dollars. By September 13,

1899, the United Railways Company apparently desired to quit active business, and so it "leased" everything it had—including its bank account—to the Transit Company, which then apparently desired to get into active business. This lease was to run for forty years. When all formalities were over, the Transit Company owned a clear working majority of all the voting stock of the United Railways Company, and the United Railways Company owned a clear working majority of all the voting stock of the Transit Company. Thus each company had absolute control of the other, but neither had control of itself—paradoxical, but true.

The Transit Company ran the street railways of St. Louis and the United Railways Company marked time until September 27, 1904, at which time the "Tripartite Agreement" was made. "Syndicate" was the third party to this agreement, United Railways and Transit Company being the other two. (If Syndicate's genesis is a matter of interest, it may be found in the principal opinion, and in other opinions herein cited.) By this agreement Syndicate acquired all of Transit Company's holdings of United Railways' voting stock, and numerous other things, and Transit Company agreed, among other things, that it would, on demand, at any time, surrender its lease to United Railways, and deliver, also to United Railways, all property of every kind and character received by Transit Company under the lease, and, in addition, "all cash, bills receivable or other credits then owned or held by it." Thus Syndicate owned a clear working majority of all of United Railways' voting stock, and therefore had control of United Railways, and United Railways owned, as has been said, a clear working majority of all of Transit Company's voting stock and therefore had control of Transit Company, and, in addition, was armed with the specific power to strip Transit Company at any time, on demand, of its lease and all property received under the lease, and in addition all cash and credits then belonging to Transit Company, regardless of the amount of cash and credits,

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and regardless also of whether there had been a breach of the terms of the lease or not. This power United Railways was bound by contract to exercise whenever Syndicate called upon it to do so.

In the meantime, Transit Company had become liable to answer in damages to divers and sundry, and specifically to Murphy and Madigan and Schmitt, and numerous others, for personal injuries, in large sums. These claims already were in the form of judgments, or ultimately assumed that form. The situation was charged with evil omen, for Transit Company and for its creditors. The president of United Railways was also president of Transit Company, the secretary of United Railways was also secretary of Transit Company, and the auditor of the United Railways was also auditor of Transit Company. In addition, the eleven directors of United Railways were (with a single exception) also directors, and all of the directors (with a single exception) of Transit Company, counsel for United Railways was counsel for Transit Company, the stockholders of both companies were, in the main, identical—and United Railways was controlled by Syndicate. Less than thirty days after the execution of the "Tripartite Agreement," on October 26, 1904, to be exact. United Railways demanded that Transit Company should instantly surrender up its lease and all assets received under the lease, and all cash, bills receivable and other credits as provided in the "Tripartite Agreement," and on October 29, 1904, thirty-two days after the execution of the "Tripartite Agreement," Transit Company complied, in minutest detail, with that demand. It not only complied with the terms of the Tripartite Agreement, and of the demand made under it, but it went much farther. It voluntarily delivered to United Railways all other property which it had accumulated during the five years it had been operating the railway system, and of these accumulations there seems to have been a huge volume. A detailed statement of this sum and its items is found in *Barrie v. United Railways Co.*, 138 Mo. App. 557,



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and need not be repeated here. This surplus was delivered, gratuitously, when no obligation, contractual or otherwise, existed requiring its delivery, and when its delivery had not even been demanded. Section Fourteen of the lease did indeed call for the forfeiture of all this surplus in the event of a breach by Transit Company of the terms of the lease, but there was no pretense, even, that any breach had occurred. There was no provision, even in the Tripartite Agreement, calling for this sacrifice.

Murphy, Madigan, Schmitt, et al. had not been paid, however, and the "Tripartite Agreement" carried no guarantee that they ever should be paid. Thereupon, Murphy, Madigan, Schmitt et al. assigned their judgments to respondent Johnson, who brought this suit. Johnson claims that United Railways took back from Transit Company some millions more than it "leased" to that now financial derelict, and that a court of equity should compel United Railways to pay the judgments of Murphy, Madigan, Schmitt et al. United Railways denies this claim, and asserts that neither at law nor in equity is it bound to pay any of those judgments, and in its briefs filed herein, (though not in its pleadings) it intimates that Johnson has no standing in a court of equity, his hands being lacking in that degree of cleanliness which entitles him to be heard, for he purchased the judgments in question at too low a price, to-wit, at about one third of their face value, but inasmuch as even that sum was exactly that much more than United Railways would pay, or than Transit Company could pay, after Syndicate and United Railways had taken possession of all of its assets, that suggestion cannot be taken seriously. Respondent has a justiciable claim and as between the parties to this action that fact suffices.

What is the salient question in this case? It is stated negatively by the eminent counsel for appellant in point three in his brief in this case, as follows: "Plaintiff is not entitled to recover because he has neither shown that appellant Railways Company agreed to as-

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sume the liabilities of the Transit Company, or that it took the assets of Transit Company without any or adequate consideration." It is conceded that United Railways did not expressly agree to assume the liabilities of Transit Company which are here in suit. All that then remains to be answered is, did United Railways take the assets of Transit Company without any or adequate consideration? This is the crux of the whole controversy.

This is a question of fact. But if authority be sought for any questions of law hereinafter touched upon, it may be found in abundance in *Barrie v. United Railways Co.*, 138 Mo. App. 557; *Johnson v. United Railways Co.*, 247 Mo. 326, and the cases hereinafter cited. The opinion in the *Barrie* case, *supra*, was in express terms adopted and approved in the *Johnson* case just cited.

It may be noted, in passing, that the parties to the Tripartite Agreement view the claims of Murphy, Madigan, Schmitt, et al., with large indifference. Mr. Murray Carleton, president of the United Railways and president also at the same time of Transit Company, testified as follows:

"Q. You had no concern about people who had claims against the Transit Company, as to whether they were paid or not paid? A. None whatever.

"Q. And you didn't care anything about it? A. Not a particle."

Mr. Carleton by virtue of his office as president of Transit Company (it then being insolvent) was, in a sense, a trustee of an express trust for the benefit of "people who had claims against Transit Company." "To the extent to which the assets of a corporation may be regarded as a trust fund for its creditors, the directors are undoubtedly the trustees of those assets for the creditors of the corporation." [10, Cyc. 788; *Fogg v. Blair*, 139 U. S. 118, l. c. 126; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Upton v. Tribilcock*, 91 U. S. 56; *Hatch v. Dana*, 101 U. S. 205; *County v. Allen*, 103 U. S. 498.] There is no question but United Railways knew of the claims against Transit

Company. Having the same executive officers, the same claim department, the same counsel, and with a single exception of one member of each board, the same individuals upon the board of directors of each, notice to one company was necessarily notice to the other. It is also beyond dispute that United Railways Company took over every vestige of the assets of Transit Company. In the terse language of Mr. Carleton, Transit Company simply "moved out," and United Railways "moved in." The consideration for this transfer it appears also by the testimony of Mr. Carleton, president of both companies and presumably in position to know, was the release by United Railways of the obligations imposed upon Transit Company by the lease, and some "circumstances." Witness the following:

"Q. Now, Mr. Carleton, isn't it true that the only consideration that the Transit Company ever received in this agreement, as far as you understood, was a mere discharge of liability under the terms of its leasehold? A. No, sir.

"Q. Well, what else did the Transit Company get?

A. Well, by consideration I suppose you mean that there was some substantial consideration. I will state that there were circumstances.

"Q. There were circumstances? A. Yes, sir.

"Q. But no actual consideration? A. No, no consideration but circumstances."

However, it may be assumed, and the record, indeed, seems to show, that the "circumstances" referred to were the assumption by the United Railways Company of certain large obligations of Transit Company, already, for the most part, liens upon the property, but not including the claims here in question.

The question then arises whether or not the discharge of Transit Company from the obligation of its lease, together with the assumption of certain obligations of Transit Company by United Railways, constituted a fair consideration for this transfer. On this point there is a sharp conflict in the evidence. The value of the lease

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thus surrendered by Transit Company is estimated by some witnesses at sums varying from three millions to thirty-two millions of dollars, and other witnesses with equal confidence testify that it was a liability and not an asset. Inasmuch as this lease still had about thirty-five years to run, and covered one of the large street railway systems of the country, it seems improbable that it was valueless, and much more likely that its value was great:

The questions involved in this case are not new in a court of equity. Practically the identical facts here involved and all matters of law growing out of them, have been adjudicated in various trial courts, in the St. Louis Court of Appeals, and in this court in other cases and are now presented anew in this case. In *Johnson v. United Railways Co.*, 247 Mo. 326, this court, referring to the question of the adequacy of the consideration paid by United Railways, said, in substance, that United Railways "was benefited in vast amounts by relief from its bond guaranties, from the release of its lease, thereby taking over the leasehold estate enormously bettered and swollen by the outlays of Transit Company and of great value; it got over \$600,000 in cash from the Transit Company, a great amount of other assets in supplies, and at the end came out the owner of a great block of stock once the property of Transit Company. So, it stepped into a business . . . that netted over a million dollars the last year it ran (a phenomenal year, it is true) and took over a plant of which its president boasted it was equipped so well it needed no extra expense for betterments for a considerable time." [*Johnson v. United Railways*, *supra*, l. c. 363.] Later in the same opinion, l. c. 366, reference is made to the "disproportionate gains accruing from the transaction as compared to what was paid out."

The same matters were in issue in the the *Barrie* case, *supra*, and in that case the St. Louis Court of Appeals concluded "that the liabilities claimed to have been assumed as a consideration by the United Railways for

taking over the assets of the Transit Company did not equal, by a large sum, the assets turned over." [Barrie v. United Railways, *supra*, l. c. 667.]

Both in the Johnson case and the Barrie case, the findings of the trial courts were evidently in harmony with the conclusion of the Courts of Appeals and of this court upon this question. In this state of affairs, it is not only proper to give some weight to the findings of the trial court, but it is entirely proper, also, to give strongly persuasive effect to the fact that the appellate court in each instance agreed with the chancellor below upon the question of fact. That question has already been decided adversely to appellant five times; once by the trial court and once by the St. Louis Court of Appeals in the Barrie case, *supra*; once by the trial court and once by this court in the Johnson case, *supra*, and again by the trial court in this case. There is nothing in the voluminous and jumbled record before us in this case to justify a different holding now. It is reasonable to conclude that United Railways did not pay a fair consideration for the property it took over from Transit Company, and that the difference between the amount actually paid and the value of the assets actually received was largely in excess of respondent's claims. This difference, whether it arose from the value of the unexpired term of the lease or from any other source, was the property of Transit Company, and was a trust fund for the payment of its debts. Why, then, did Transit Company deliver this surplus to United Railways, when its delivery had not even been demanded? There is and there can be but one explanation for this extraordinary action. Transit Company was, at that time, a mere name, "a shadow cast by turning"—and a devious turning at that. It was "such stuff as dreams are made of," devoid of any will or power of its own, and incapable of contracting to the detriment of its creditors. Much is said in the briefs on the question of whether the course of conduct between these two companies which resulted in the delivery of all of the assets of the one to the other

was a sale, an entry under the terms of the so-called lease, a voluntary surrender by Transit Company, or what not. The question does not seem to be of more than academic interest, so far as this case is concerned. By whatever name it may be called—and, indeed, it might well be described as “a deed without a name”—it was utterly void as to creditors, and no time need be consumed in naming it.

“Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and re-adjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. Cf. *San Francisco & N. P. R. R. v. Bee*, 48 Cal. 398; *Gruell v. Detroit Gas. Co.*, 112 Mich. 70.” [*Northern Pacific Ry. Co. v. Boyd*, 228 U. S. l. c. 502.]

In the *Boyd* case, the property which was held to be subject to his claim had been sold under order of court and had again been sold by the purchaser at that sale, yet the second vendee was nevertheless held liable. There is nothing new in the case at bar, except, perhaps, some minor details in the method. The general scheme and plan does not differ in principle from similar transactions called in question and held void in hundreds of cases. Neither is there any doubt or novelty about the equitable principle upon which such transactions are and should be held void.

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"It is a well-settled principle of equity jurisprudence that a party holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use or for his benefit; and if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage. [Newcomb v. Brooks, 16 W. Va. 32, 59, and cases cited.] In Reilly v. Oglebay, 25 W. Va. 36, 43, this court, following Newcomb v. Brooks, supra, says: 'This rule is not confined to trustees and fiduciaries in the technical sense of those terms, but it extends to every person coming within the reason of the rule. In embraces trustees, guardians, executors, administrators, agents, cashiers of banks, factors, auctioneers, sheriffs, commissioners in bankruptcy, and their solicitors, assignees of bankrupts, attorneys at law, *directors of corporations*, and parties bearing many other relations to each other which may not be classified.' Newcomb v. Brooks, 16 W. Va. 63; Abbott v. American Co., 33 Barb. 578." [Sweeney v. Sugar Co., 30 W. Va. 443, 1. c. 450.]

If further authority is desired, it may be found in any rudimentary work on equity jurisprudence, and practical application of the doctrine, fully supporting the conclusions herein announced, may be found in the following cases: Grenell v. Detroit Gas Co., 112 Mich. 70; Fort Payne Bank v. Sanitarium, 103 Ala. 358; Missouri Lead Co. v. Reinhard, 114 Mo. 218; Bertholdt v. Holladay-Klotz Co., 91 Mo. App. 233; Montgomery Web Co. v. Dienelt, 133 Pa. St. 585; Singer v. Hutchinson, 183 Ill. 606; Barksdale v. Finney, 14 Gratt. 338; Chicago Ry. Co. v. Ashling, 160 Ill. 373; Camden Interstate Ry. Co. v. Lee, 84 S. W. 332.

After all, when stripped to its essential elements (and an effort has been made in this opinion so to strip this case), the question to be decided is a very simple one. Appellant wrongfully appropriated property to which respondent was entitled to look for the payment

of his claims. This cannot be done. The hand of a court of equity is not stayed by metaphysical distinctions nor by specious reasoning as to questions of separate corporate identity, nor are the issues clouded by the ceremonial of separate, though in individual composition practically identical, boards of directors, nor technically existent, but in fact wholly imaginary, powers of corporations, bound together as these two corporations are shown to have been, to contract freely together and thereby to bind the rights of third parties. Equity looks to substance rather than to form, and will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality. "The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid" [Northern Pacific Ry. v. Boyd, 228 U. S. l. c. 504.] The sum of the whole matter is that when the minutes all were written and the contracts all were drawn, when the stocks and bonds had all been shuffled and shifted and results were all disclosed, it was found that Syndicate had reaped a profit of a quarter of a million dollars; United Railways had gathered profits estimated by some witnesses in indefinite millions and described in opinions of this court, and of the St. Louis Court of Appeals, as "large sums" and "disproportionate gains;" Transit Company had been stripped to its naked hide; and Murphy, Madigan, Schmitt, et al. had been left unpaid and confronted by another law suit.

What is there in all this legal labyrinth to bar the course or stay the hand of justice? There is nothing. "Justice moves with a leaden heel, but strikes with an iron hand." And so, with little effort, the hand of justice cleaves its way through all entanglements to seize upon the vital fact—five times heretofore found to be a fact—that United Railways took more than it paid for. It must answer for it. Thus shall vindication come to the rights of Murphy, Madigan, Schmitt et al., the humble victims



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of Transit Company's negligence and of United Railways Company's greed.

The judgment of the trial court should be affirmed.

*Walker, C. J., and Williams, J., concur.*

GRAVES, J. (dissenting).—In this case, I dissent from the opinion by the learned Special Judge, for the reason expressed by VALLIANT, C. J., in the case of *Johnson v. United Railways Co.*, 247 Mo. 1. c. 366. *Woodson, J.*, concurs in these views.

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GERALDINE H. CARSON et al., Appellants, v. CHARLES L. LEE.

Division One, March 2, 1920.

1. **Deed as Mortgage: Right of Redemption: Limitations.** A conveyance in the form of a warranty deed, made and accepted as security for a debt, is a mortgage, and leaves in the mortgagor an equity of redemption which cannot be clogged or abridged by a stipulation in it that redemption must occur within ten years.
2. ———: **The Word Redeem: Intention.** Whether or not a deed, otherwise absolute, is to be construed to be a mortgage, is not to be determined by the use of the word "redeem" used in a stipulation clause therein by which the grantee agrees that the grantors "may at any time within ten years redeem said land" and upon the payment of a named sum of money he "will reconvey" to them, for though the word is appropriate to express an equitable right of redemption, it is not of fixed meaning, and the nature of the instrument, whether mortgage or conditional sale, is not determined by its use, but by the intention of both parties at the time it was made. If made to be a mortgage it retains the character then intended; otherwise, a deed absolute on its face, with an agreement to reconvey upon conditions, cannot be construed to be a mortgage, but is a conditional sale or deed of purchase.
3. ———: **Intention: Extrinsic Evidence.** The terms of a deed may show so clearly on its face the real understanding of the parties, that no aid from extraneous circumstances is required or permitted to interpret it. On the other hand, it may leave the question whether it is a mortgage or deed of purchase in such doubt, that

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extraneous evidence is necessary to determine its character, and then such evidence is competent.

4. ———: **Dept.** A condition indispensable to a holding that a warranty deed was intended to be a mortgage is that there must have been a debt to secure, or some liability against which the grantee is to be guarded; for the purpose of a mortgage is security.
5. ———: ———: **To Pay Debts.** Where the grantee was surety for one of the grantors on notes to the amount of a few hundred dollars, but neither was otherwise indebted to him, the notes were paid out of the \$4000 named as the consideration for the deed, as was an existing mortgage for \$800, and no assignment of any of the notes was made to the grantee, and there is no evidence that the balance of the consideration was advanced as a loan to either grantor, and no loan evidencing a debt was taken and no debt was mentioned in the deed, there was no debt secured by the instrument, and to hold there would be to run counter to all ordinary experience in business transactions.
6. ———: ———: **Repayment.** The fact that the stipulation in the deed permitting the grantors to redeem and obligating the grantee to reconvey on the payment of a named sum, contained no agreement binding the grantors to pay the sum named or any part of it, is a circumstance of weight, though not conclusive, in determining whether or not the instrument was a mortgage.
7. ———: **Possession: Taxes: Surplus After Paying Debts.** The facts that the grantee was put into possession when the instrument was executed, that he was by it required to pay the taxes thereafter, and where the grantors were financially embarrassed, that the consideration was more than grantors' debts paid by him and the balance was turned over to them, without note or other evidence of a loan, all likewise point significantly to a conclusion that the instrument was not a mortgage.
8. ———: **Subsequent Indemnifying Bond.** The fact that the purchaser from the grantee in a deed which contained a stipulation that the grantors might redeem upon the payment of a named sum of money, exacted of the surviving grantor and the grantee a bond to indemnify himself against loss because of an apprehended possible right in the heirs of the deceased grantor to redeem, and that of the purchase price paid by said purchaser a part was paid to said surviving grantor, whose ten-year right to repurchase had not expired, sheds no light on said original transaction and has no tendency to prove that said original deed was a mortgage, for the character of the transaction was fixed when said deed was made.
9. **Conditional Sale: Right of Heirs to Repurchase.** Some authorities holding an option to purchase property creates no interest that is

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either assignable or transmissible to heirs of the option-holder, are cited in the opinion, but the point is not ruled, because it is unnecessary to a proper adjudication of the issues.

Appeal from Mississippi Circuit Court.—*Hon. Frank Kelly, Judge.*

**AFFIRMED.**

*Haw & Brown* for appellants.

(1) The court, upon the objection of defendant, refused to permit plaintiffs to show that at the time the conveyance from Addie Howlett and her husband was made to Luke Howlett, Price Howlett, husband of Addie, was being hard pressed and even sued on claims against him. Such testimony was proper. 27 Cyc. 1006 (c); Brightwell v. McAfee, 249 Mo. 579; Powell v. Crow, 204 Mo. 487; Book v. Beasley, 138 Mo. 455; Cobb v. Day, 106 Mo. 278. It does not matter that the evidence was concerning the husband's debts, as the wife may mortgage her lands to secure her husband's debts. Hack v. Hill, 106 Mo. 26. (2) The court erred in failing and refusing to hold that the conveyance from Addie Howlett and Price Howlett to Luke Howlett, was a mortgage and that plaintiffs, the heirs of Addie Howlett, had a right to redeem the land therein described. The suit was brought in time. Lipscomb v. Talbott, 243 Mo. 28; Sheppard v. Wagner, 240 Mo. 437; Wilson v. Drumrite, 21 Mo. 325; Ballinger v. Chouteau, 20 Mo. 89; 27 Cyc. 1029 (c); R. S. 1909, sec. 1881; Rutte v. Carothers, 223 Mo. 647; Gray v. Yates, 67 Mo. 601. (3) The instrument sued on is a mortgage and should have been so construed. Where a deed absolute in form contains a clause reserving to the grantors a right to redeem the premises by the payment of a specific sum within a limited time, this will generally convert the transaction into a mortgage, being taken as manifesting the intention of the parties to create a security only. 27 Cyc. 997 (IV); Sheppard v. Wagner, 240 Mo. 437; DesLoge v. Ranger, 7 Mo. 330. (a) The intent as expressed in the instrument itself should control. 13 Cyc. 604, 604-D, 606 (b); 34 Cyc. 766; 3 Bou-

vier's Law Dictionary (3 Rev.), p. 2858; 27 Cyc. 997 (IV); 7 Words and Phrases, p. 6023. (b) Even where the intention is doubtful, and the court is to determine whether the transaction is a mortgage or a conditional sale, it will be held a mortgage, as that construction is the more just and equitable. Phillips v. Jackson, 240 Mo. c. 332, Powell v. Crow, 204 Mo. 490; Turner v. Kerr, 44 Mo. 434; Bender v. Markle, 37 Mo. 246; Brant v. Robertson, 16 Mo. 145; White v. University Land Co., 49 Mo. App. 464. (4) A deed absolute on its face may be a mortgage. 27 Cyc. 991, 994 (b) 996 (b); Chance v. Jennings, 159 Mo. 554; Book v. Beasley, 138 Mo. 455; Hack v. Hill, 106 Mo. 18; Sharkey v. Sharkey, 47 Mo. 543; Tibeau v. Tibeau, 22 Mo. 77; Wilson v. Drumrite, 21 Mo. 325; McDowell v. Morath, 64 Mo. App. 297. (5) The fact that there is no agreement to pay interest in this case is more than offset by the grantee taking possession and retaining the rents and profits. Lipscomb v. Falbott, 243 Mo. 1; Bender v. Zimmerman, 122 Mo. 194; Towner v. Johnson, 95 Mo. 431; Ely v. Turpin, 75 Mo. 83.

*Russell & Joslyn* for respondent.

(1) The petition states no cause of action. Jones v. Hubbard, 193 Mo. 163; Branham v. Peltzer, 177 S. W. 374; Donovan v. Boeck, 217 Mo. 87. (2) The death of Addie Howlett before the expiration of the ten-year period could not extend the time limit for more than three years after her death. R. S. 1909 sec. 1883; Smith v. Settle, 128 Mo. App. 382; Reed v. Painter, 145 Mo. 341; Schradski v. Albright, 93 Mo. 42. (3) There was no existing debt alleged or proven, therefore the maxim "no debt, no mortgage" should be applied. Donovan v. Boeck, 217 Mo. 87. (4) At the time she executed the deed, Addie Howlett was a married woman, and in law deemed a *femme sole* so far as to enable her "to contract and be contracted with." R. S. 1899, sec. 4335; R. S. 1909, sec. 8304. (5) The deed itself and all of the evidence shows the transaction to be a complete sale, with the right re-

served in the grantors, or "either of them," to repurchase within a specified time. *Turner v. Kerr*, 44 Mo. 433; *Slowey v. McMurray*, 27 Mo. 113; *Bobb v. Wolff*, 148 Mo. 335; *Dunaway v. Kerr*, 163 Mo. 415; *Bailey v. Trust Co.*, 188 Mo. 486; *Powell v. Crow*, 204 Mo. 481. (6) The sale was a conditional one, and even if there had been no redemption by *Price Howlett*, *Addie Howlett*, had she lived, could not have redeemed after the expiration of the ten-year period. *Bobb v. Wolff*, 148 Mo. 349. (7) The burden was on the appellants to show by clear and convincing proof that the deed was a mortgage. *Cobb v. Day*, 106 Mo. 278; *Book v. Beasley*, 138 Mo. 455; *Bobb v. Wolff*, 148 Mo. 335. (8) "Redeem," as defined by the law writers, means to purchase back; to buy back; to repurchase in a literal sense. 3 *Bouvier's Law Dictionary* (3 Rev.) p. 2852; 34 *Cyc.* 766. (9) In order to show that a deed absolute in form was intended as a mortgage, the evidence must be satisfactory as to its credibility, unequivocal as to its terms and meaning, and clear and convincing beyond a reasonable doubt. *Gerhart v. Tucker*, 187 Mo. 46; *Brightwell v. McAfee*, 249 Mo. 562.

GOODE, J.—Plaintiffs, who are the children and only heirs of *Addie Howlett* and *Sterling Price Howlett*, both deceased, filed this action to obtain a decree that they be allowed to redeem a parcel of land, consisting of seventy acres, from the operation of an alleged mortgage made by their parents. The instrument said to be a mortgage, executed and recorded July 6, 1903, was to *Luke Howlett*, a brother of said *Price*, and was in form a warranty deed, except that it contained this paragraph:

"And said *Luke Howlett* agrees that said *Price* and *Addie Howlett* may at any time within ten years redeem said land and he will upon payment to him of said sum of \$4,000 reconvey to them or either of them the said land without payment of any interest. Subject to the easement of public and railroads, if any, over said land. Purchaser assumes payment of all taxes falling due after the year 1903."

When that conveyance was made the title to the land was in Mrs. Addie Howlett, subject to a deed of trust given by Addie and S. P. Howlett, her husband, October 17, 1901, to E. J. Deal, trustee, to secure the payment of a note for eight hundred dollars, due in three years, to J. J. Russell, which incumbrance the deed to Luke Howlett bound the latter to pay, as later he did. Price Howlett had conveyed the land to Addie in consideration of love and affection, September 18, 1895, or eight years before the conveyance to Luke. He was in embarrassed circumstances when the latter conveyance was made by himself and wife; creditors were pressing him and judgments had been rendered against him. Neither of the grantors owed Luke anything at the date of the deed, but he was surety for Price on four notes to three banks, the notes ranging in amount from two hundred to sixty dollars, Luke testified. These notes and other debts of Price, to the amount of \$3500, were paid by Luke, and as a balance of \$440 of the purchase price of \$4000 remained, this was paid to Addie and Price Howlett, the grantors. Mrs. Addie Howlett died March 30, 1906, and afterwards, on December 30, 1907, Luke Howlett and his wife Mable and S. Price Howlett sold and conveyed the land in question to defendant, Charles L. Lee, for five thousand dollars, of which sum Luke Howlett received four thousand dollars and Price one thousand. By the advice of his attorney, Lee exacted from the grantors a bond dated January 10, 1908, with sureties, in the sum of two thousand dollars, wherein the aforesaid deed by Addie and Price Howlett to Luke Howlett was referred to, with the statement that in the deed "there was given said Addie Howlett and S. P. Howlett the right to redeem said land within ten years from the date of said deed." The condition of the bond was this:

"Now if the heirs of said Addie Howlett, deceased, or any one of them, shall have the right to redeem said land, as it is claimed they have, and do redeem said land, then if in that event said Luke Howlett and S. P. Howlett shall pay the said Charles Lee all the sums paid

by him for said land and the reasonable value of all permanent improvements put on said lands by him and hold him safe and harmless from any and all loss on purchase price and permanent improvements by reason of said property being redeemed and taken from him, than this obligation to be void, otherwise to remain in full force and effect.

"It being fully understood and agreed that if the said land be redeemed the sum paid by the parties redeeming it shall be applied to paying said Lee and protecting him from loss on account of said purchase and redemption."

Price Howlett died December 24, 1911. The petition states facts to show the deed in question was executed as a mortgage to secure Luke Howlett in the payment of debts Price owed him, as surety for Price, and in the reimbursement of judgments and other debts of Price he (Luke) agreed to pay out of the consideration of four thousand dollars mentioned in the deed; avers defendant purchased with actual notice of the right and intention of plaintiffs to redeem the land; that they had offered to pay defendant four thousand dollars, with interest at six per cent from July 6, 1913, when, it is averred, interest began to run on the instrument, concluding with a prayer to be allowed to redeem and for an accounting to ascertain the amount due to defendant, taking into consideration the rents and profits he had received while the land had been in his possession. The answer of defendant admitted the truth of some of the statements of the petition and denied others, to-wit: that Addie and Price Howlett owed any debts to Luke when they conveyed to him; that he was surety for Price; that there were judgment liens on the land at the date of said conveyance; that defendant had knowledge or information sufficient to form a belief concerning any agreement which might have been made between Addie and Price and Luke concerning the land, other than the agreement contained in the deed; averred Addie died without exercising the right given her by the deed to redeem, referred

to the conveyance to defendant, after Addie's death, by Luke Howlett and wife and Price for five thousand dollars, and said one thousand dollars of the sum "was paid to the said S. Price Howlett as and for the equity of redemption which Addie Howlett and S. Price Howlett, or either of them, had reserved in the conveyance to said Luke Howlett."

The answer sets up that Luke Howlett took possession of the land as soon as it was conveyed to him, paid all the taxes on it and exercised rights of ownership over it until he conveyed it to defendant, and that since then the defendant "has been in the open, notorious, continuous, hostile and adverse possession," claiming to be owner, and since July 6, 1913, has continued in the like possession. Other matters are stated, but they are propositions of law rather than facts, as are some of the things averred in the reply of plaintiffs, among them a denial that defendant's possession was adverse to plaintiffs and an averment that it was simply the possession of a mortgagee before foreclosure.

The allegations are made in the replication that this action was begun within less than twenty-four years after the cause of action (i. e. the right to redeem) descended to plaintiffs; that when it descended both plaintiffs were under twenty years of age and the action was filed before Norman Howlett was twenty-one, and within three years after the disability of Geraldine Howlett Carson was removed. She was twenty-three years old February 10, 1916, and Norman was twenty December 12, 1916, or three months after the petition was filed on September 8, 1916. The attorney who drew the deed asserted to be a mortgage, was Hon. J. J. Russell, and several items of his testimony touch upon the intention of the parties:

"I remember in an indefinite way that they said Price might want to get the place back and Luke had agreed that if he wanted to redeem the place he could do so at any time within ten years, and the deed was written to express their intentions the best I knew how to express them at the time. To my best recollection the



whole agreement was to the effect as expressed in the deed. . . .

"Luke and Price Howlett told me how to write the deed, if there was any outside agreement other than stated in the deed, I do not now recall it, but there may have been agreements between them of which I knew nothing, but, as stated in the deed, I am sure both gave that to me as their agreement. . . .

"There was nothing said to me at that time by either Luke or Price that the deed was anything other than what it purported to be. My recollection of it is that it was a bona-fide conveyance. It seems that from all that was said that it was a bona-fide sale, but that Price hoped to be able to redeem it, and Luke agreed to give him ten years in which to do it. . . .

"I got the impression that Price owed debts and was going to sell the land to Luke, but that he hoped to redeem the land, and Luke consented that he should have ten years in which to do so, and Luke was assuming some of his debts. I don't think that Mrs. Addie Howlett took any part in the conversation, but she was there."

Defendant said regarding the bond:

"I took the bond upon the suggestion and advice of Mr. Deal, my attorney, and that is the reason I had him do it. That was before the expiration of the ten-year period mentioned in the deed from Price Howlett and wife to Luke Howlett.

"You knew, then, what the bond was about and what it was for? A. Yes; they read it to me.

"And you had been told what was in the deed—the right to redeem that land was reserved by Mrs. Addie Howlett and Price Howlett? A. Inside of ten years."

Luke Howlett testified, among other matters:

"When I started to sell the place to Mr. Lee, I told him I couldn't sell the place as I had a redeeming clause there."

The land was worth from fifty to fifty-five dollars an acre in 1903.

Judgment was given for defendant and this appeal was taken by plaintiffs.

Plaintiffs' petition is framed for relief on the premise that the deed of their parents, Addie and Price Howlett, to Luke Howlett, was made and accepted as security for a debt; therefore was a mortgage, which left in Addie Howlett, as the real mortgagor, an equity of redemption which descended to plaintiffs as her heirs and could not be clogged or abridged by stipulation as to the time in which redemption might occur. [Reilly v. Cullen, 50 Mo. 322; Wilson v. Drumrite, 21 Mo. 325, 328.] The fact principally relied on to prove the transaction between the parties was a loan by the grantee and the instrument intended as security for the loan, instead of what it purports to be, a sale with the right of repurchase, is the word "redeem," in the clause of the deed we have quoted. The premises usually found in warranty deeds, and found in this one, are; that the grantors, in consideration of a stated price (\$4,000 paid and received) granted, bargained, sold and conveyed and confirmed unto the grantee, the land, describing it. So, too, there are the usual *habendum* clause and a covenant of warranty. The word "redeem" was appropriate to express the equitable right left in Addie Howlett, if the instrument was a mortgage made to secure a debt to the grantee, as the word "purchaser" was the proper designation of the grantee if the conveyance was pursuant to a sale. Neither word fixes, necessarily, the nature of the instrument, and both have more than one meaning in law. A "purchaser," for example, might be one who took by gift or a will, whereas "redeem" is used in a wider sense than retrieving the title to mortgaged land and as signifying "to purchase back." In two cases decided by this court wherein the question was, as it is now, whether a conveyance was a mortgage or a sale with a right to repurchase retained by the vendor, the documents depended on, among other matters, to show the transaction was a mortgage, contained the word "redeem," but that fact was not alluded to as evidence

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the transaction was a mortgage. [Bobb v. Wolff, 148 Mo. 335, 341, 343; Bailey v. St. Louis Union Tr. Co., 188 Mo. 483, 488, 489.] In the first of those cases the grantee in the warranty deed wrote two letters to the grantor, in one of which he said: "Do you desire to redeem or purchase the property on Olive Street? Although the time is out, I have no objection to do as you wish now upon the terms originally agreed upon." In the other letter, in answer to the inquiry of the grantor as to what he would give "for my equity of redemption," the grantee said: "Don't want to buy; I have calculated on your redeeming in September." In the second case, in an agreement extending the original arrangement between the parties, the Trust Company said the grantor or his assignee "should have the right to redeem the property described in the within contract, subject to its terms, at any time prior to November 24, 1898," etc. In both cases the contract between the parties was held to have been a sale with the right of repurchase, but, as stated, the effect of the word "redeem" was not discussed.

We are cited at this point to two other decisions of this court: Desloge v. Ranger, 7 Mo. 327, and Sheppard v. Wagner, 240 Mo. 409. In both opinions the effect of a clause for redemption in a case like the present was considered, and in each the ruling was against the view that the provision was conclusive. In the first case this was expressly stated and also that the circumstances attending the transaction must be considered to ascertain the real intention of the parties. The circumstances noticed were the price in comparison with the value of the property (a negro slave), the retention of possession of the negro by the assignor, and that the slave was assigned to a mercantile firm which did not deal in slaves, and to which the assignor was indebted. In the second case the opinion, in order to determine whether the transaction was a sale or mortgage, considered whether the relation of debtor and creditor existed previous to or was created at the time of the conveyance,

and found a debt was created; next, the grantees became tenants of the grantors after the conveyance, a relation inconsistent with a sale; and, third, the grantors were to pay the liens and special taxes on the property, as the grantees naturally would do if they were purchasers. Those facts, along with the provision for redemption of the property by the grantors within three years, were held to establish a mortgage.

That technical terms which, according to their established meaning indicate either a sale or a mortgage, are not always decisive of the question, appears forcibly from a decision where the deed asserted to be a mortgage, spoke of the "indebtedness as aforesaid," of the maker to the grantee, and yet, because of other facts which showed there was no debt, the conveyance was held a sale. [Donovan v. Boeck, 217 Mo. 70, 90.]

In another jurisdiction, a conveyance in the form of a warranty deed of certain property, contained a clause which recited that it was given in satisfaction of a note and mortgage and that the grantors should have the right "to redeem or repurchase" the premises within one year, by paying the amount of the note with interest until said redemption, at the rate of fifteen per cent per annum, and all costs and taxes paid by the grantee; the grantors to have possession for said year. [Swarm v. Boggs, 12 Wash. 246, 248.] In an action to have the conveyance treated as a mortgage, after saying the instrument must be construed as an absolute deed unless the intention of the parties to treat it as a security appeared from the cited clause, the court said there was nothing in the language of the instrument to constitute it a mortgage, except that, in connection with the right to repurchase, the word "redeem" was used, and in another place, the words "redemption of the property." The decision was that in as much as the evident intention of the parties was that the conveyance should operate to pay the debt existing when it was made, those words were not sufficient to continue the debt in force and render the instrument a security.

The effect to be given to deeds like the one in hand, is determined by the intention of the parties, and of both parties, be it noted (*Holmes v. Fresh*, 9 Mo. 201, 208), at the time of the transaction, and if the deed was made to be a mortgage or a conditional sale, in either event, it retains the character then intended and the rights of the parties are determined accordingly. [*Phillips v. Jackson*, 240 Mo. 310, 332; *Brant v. Robertson*, 16 Mo. l. c. 145; *Powell v. Crow*, 204 Mo. 481, 487; 1 *Jones, Mortgages*, (7 Ed.), sec. 263; *Knowles v. Williams*, 58 Kan. 221; *Elliott v. Conner*, 63 Fla. 408; *Conway's Exrs. v. Alexander*, 7 Cranch (U. S.) 218; *Tucker v. Witherbee*, 130 Ky. 269; *Cornell v. Hall*, 22 Mich. 377.]

Probably because of the tendency of courts of equity to favor the theory of a mortgage (*Slowey v. McMurray*, 27 Mo. 113, 115), their jurisdiction is invoked frequently for relief against conveyances absolute in form, and a body of rules by which to determine the nature of the instrument has grown up. What the agreement was having been established, it is to be enforced like any other contract, whether it was a conditional sale or a mortgage; for a grantee is as such entitled to have his rights protected in the former case, as a grantor would have if it were a mortgage. [1 *Jones, Mortgages* (7 Ed.), p. 537, sec. 262.] The terms of the deed may show so clearly on its face the real understanding of the parties, that no aid from extraneous circumstances is required to interpret it; or it may leave the question in doubt, when resort will be had to other evidence. [*Desloge v. Ranger*, 7 Mo. l. c. 329, 330; 1 *Jones, Mortgages*, sec. 261 and cases cited in notes.]

In the present instance the intention of the parties cannot be ascertained certainly from the deed, hence we must look to facts beyond it. A condition indispensable to hold a deed to be a mortgage is that there must have been a debt to secure, or some liability against which the grantee is to be guarded. On this proposition all the cases agree, and in all of them will be found statements which show the decision in favor of the mortgage theory

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was based on evidence to show the instrument was given as security of some kind; for the purpose of a mortgage is security. [Brant v. Robertson, 16 Mo. l. c. 143; Donovan v. Boeck, 217 Mo. 70, 87; Flagg v. Mann, 2 Sumner, 533.] Neither Addie nor Price Howlett was indebted to Luke at the date of the conveyance in question, but Luke was surety for Price on notes to the amount of four or five hundred dollars. These notes were paid out of the price named in the deed, as were the prior deed of trust on the land, in favor of J. J. Russell, and several other debts of Price Howlett. Thus it appears the liability of Luke Howlett as Price's surety, was extinguished and the liabilities for which Luke was not surety were discharged; therefore there was no indebtedness of Addie or Price Howlett to Luke, or liability of Luke for them left in force, unless the four thousand dollars was advanced as a loan to one or the other of the grantors, and that this was so there is no evidence. To hold there was a debt still subsisting or created between the parties, would be to "run counter to all ordinary experience in business transactions," as was said in a similar case (Bobb v. Wolff, 148 Mo. l. c. 345), for if there was a debt, then if business usage was followed, the obligation taken up by Luke Howlett would have been transferred to him or a new note given by Price Howlett for \$4,000.

We refer to these other circumstances as pointing to the conclusion that the transaction was a sale with the right accorded to the vendors to repurchase, all of which circumstances the courts have held tend to establish that fact. None of the obligations of Price Howlett, which were paid out of the consideration, were assigned to Luke. [Brant v. Robertson, 16 Mo. l. c. 139, an early but thoroughly considered opinion; Slowey v. McMurray, 27 Mo. l. c. 116; Turner v. Kerr, 44 Mo. 429, 431.]

No note or other evidence of a loan by him to Price or Mrs. Howlett was taken, and no debt was mentioned in the deed, nor did it contain a stipulation binding either of the grantors to pay the grantee \$4,000, or any other sum; a circumstance of weight, though not conclusive.

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[Conway's Exrs. v. Alexander, 7 Cranch, (U. S.) 218; Justice Story in Flagg v. Mann, supra, as quoted in Brant v. Robertson, 16 Mo. l. c. 144.]

Luke Howlett was put in possession of the premises at once. [Desloge v. Ranger, 7 Mo. l. c. 331; Cobb v. Day, 106 Mo. l. c. 297.]

Luke, the grantee, agreed to pay the taxes on it which would fall due after the year 1903. [Bobb v. Wolff, 148 Mo. l. c. 344, 345.]

The consideration was more than enough to pay the debts of the grantors, and the surplus left after paying those debts was turned over to the grantors. [Fort v. Colby, 144 N. W. 393; Powell v. Crow, 204 Mo. l. c. 488.]

We think those facts considered along with the terms of the instrument itself, plainly show that the transaction between the parties was intended by both sides as a sale with the right in the vendors to purchase back, if they were able, within ten years; an arrangement entered into by Luke Howlett to help his brother out of his financial embarrassments; and that they were kin is to be remembered. [Powell v. Crow, 204 Mo. l. c. 487.]

We may add that the oral testimony points to the same conclusion as the other facts we have noticed.

Let us look at the case from another point of view: if the conveyance was in fact a mortgage, Luke Howlett had the right, after ten years, to insist on the payment of his loan, and in default of payment to foreclose the mortgage, have the property sold and if he did not realize thereby enough to discharge the debt, to maintain an action against Addie and Price Howlett for the balance. [Slowey v. McMurray, 27 Mo. 113, 116; 1 Jones, Mortgages (7 Ed.), sec. 264; Henley v. Hotaling, 41 Cal. 22; McNamara v. Culver, 22 Kan. 661.] Can it be thought such was the intention of the parties? Or, is not the conclusion irresistible that an option was given to the grantors to buy back? We accept the latter as the proved nature of the transaction, without invoking the rule that the evidence, to show a deed absolute in form is a mort-

gage, must be cogent and convincing. [Gerhardt v. Tucker, 187 Mo. 46.]

Plaintiffs emphasize the fact that defendant, when he purchased the land from Luke Howlett, required a bond to indemnify him against a possible claim by the plaintiffs, and that Price Howlett was paid one thousand dollars or the difference between the price defendant was to give and the sum for which Addie and Price Howlett might repurchase from Luke. As stated before, the character of the deed was fixed by the intention of the parties when it was made; and that Lee, by way of precaution, exacted security against a possible right in plaintiffs to redeem, sheds no light on the original transaction and has no tendency to prove it was a loan secured by a mortgage; but simply shows defendant was apprehensive and wished to guard against contingencies. The one thousand dollars paid to Price Howlett was for his right to repurchase, the ten-year period for which the right was reserved not having expired when defendant purchased in 1907. By the terms of the deed to Luke Howlett, the right was accorded to Addie and Price Howlett, and the former being at the time of full legal capacity, was competent to make that arrangement. [R. S. 1909, secs. 4335, 8304; Rice, Stix & Company v. Sally, 176 Mo. 107.]

We have held the transaction in question was a conditional sale to Luke, and as the only issue raised by the pleadings and briefed and argued was as to whether it was a sale or a mortgage, it is unnecessary to ascertain the respective rights, under the clause which provides for a repurchase, of Price Howlett and plaintiffs, as the heirs of Mrs. Howlett, or whether plaintiffs acquired any rights thereunder at the death of their mother; but we refer to some authorities which hold an option to purchase property creates no interest that is either assignable or transmissible to the heirs of the holder of the option. [Sutherland v. Parkins, 75 Ill. 338; Newton v. Newton, 11 R. I. 390; Rease v. Kittle, 56 W. Va. 269.]

The judgment is affirmed. All concur.



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Nicholas v. Evangelical Deaconess Home.

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AMELIA NICHOLAS, Appellant, v. EVANGELICAL  
DEACONESS HOME & HOSPITAL

Division One, March 2, 1920.

1. **CHARITY: Shown by Articles: Parol Evidence.** An association whose purposes are to nurse the sick and establish and support a home where deaconesses are to be educated and trained to serve as nurses for sick and aged persons admitted to the home, whose members are required to believe in the creed of the Apostles and are to pay annual dues and receive no dividends or compensation, and whose directors have no power to distribute funds to its members as profits or otherwise, but only to use them to carry out its charitable and benevolent objects, is a charitable association. And all these facts appearing from its articles of association, parol evidence to show its charitable character is not necessary, but evidence to the effect that its funds, whether received from dues or donations or derived from pay patients, were held in trust for the charitable and benevolent purposes of the organization, does not destroy or alter its character as a charity.
2. ———: **Personal Injury to Patient: Recovery of Damages.** A charitable association is not liable in damages for personal injuries to its patients caused by the negligence of its trustees, servants or employees. The funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted or absorbed by claims arising from the negligence of the trustees or employees.
3. ———: ———: ———: **Pay Patient.** The fact that the patient at the hospital for the charitable association was not a charity patient, but paid for all the services rendered by the nurses and for the medicines and supplies furnished by the association, does not entitle her to recover damages for injuries caused by the negligent application by a nurse of carbolic acid, instead of alcohol, to her skin, during the course of a massage prescribed by her physician.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings, Judge.*

**AFFIRMED.**

*Jourdan, Rassieur & Pierce* for appellant.

(1) Where one is permitted, temporarily in the absence of the regular servant or agent, to take the place and charge of matters committed to such absent agent or servant, he has for the time being the same authority as if he were the regular agent or servant. 21 R. C. L. sec. 34, pp. 855-856; *Storage Co. v. Cox*, 74 Ohio St. 284, 78 N. E. 371. (2) The owner of a grocery store or retail business (or a drug store, as at bar) placing another in charge thereof is held to have authorized such person so placed in charge to make sales and dispense the goods (or drugs) in the usual course of business. *Henson v. Keet & Rountree Mer. Co.*, 48 Mo. App. 214. (3) In determining whether plaintiff should be non-suited the testimony must be viewed in the most favorable aspect for plaintiff. This deprives the defendant of the right to urge on the court that it assume a fact or facts to exist upon which there is a complete absence of evidence.

*Watts, Gentry & Lee* for respondent.

(1) The judgment should be affirmed, because the relation of master and servant was not shown to exist between the respondent and any person who committed any negligent act which resulted in injury to the plaintiff. The burden was upon the appellant to make that proof, and, the appellant having wholly failed to do so, the judgment should be affirmed, regardless of the question as to whether or not respondent is exempt from damages for its servants' acts because it is a charitable institution. At best, plaintiff's evidence leaves it in doubt and uncertainty whether the injury resulted from negligence of an employee or that of a person who was not an employee. The cause being left to speculation, a demurrer to the evidence was properly sustained. *Goransson v. Ritter Co.*, 186 Mo. 300; *Kane v. Railroad*, 251 Mo. 30; *Caene-felt v. Bush*, 198 Mo. App. 491. (2) The respondent was shown by undisputed documentary evidence, to be a

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charitable institution, and, under the law of this State, and under the great weight of authority in other states, and in England, a charitable hospitable is not liable for the torts of its servants committed in the treatment of patients. Therefore, even if the plaintiff had been injured by a negligent act of some servant of the respondent, while engaged in the line of his or her duty, there would still be no right of recovery. The fact that many patients paid for the privileges of the hospital, or the fact that in one year some surplus was left after the expenses were paid, does not change the institution from a charitable one to a business corporation. *Adams v. University Hospital*, 122 Mo. App. 675; *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116; *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294; *McDonald v. Mass. General Hospital*, 21 Am. Rep. 539; *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 431; *Downs v. Harper Hospital*, 101 Mich. 555, 45 Am. St. 427; *Hospital v. Ross*, 12 Clark & F. 507; *Gooch v. Association*, 109 Mass. 508; *Cunningham v. The Sheltering Arms*, 119 N. Y. Supp. 1033; *Collins v. New York Post Grad. Med. Hospital*, 89 N. Y. Supp. 106; *Wilson v. Brooklyn Homeopathic Hospital*, 89 N. Y. Supp. 619; *Pephe v. Grace*, 130 Mich. 493; *Parks v. N. W. University*, 121 Ill. App. 512, 218 Ill. 381, 2 L. R. A. (N. S.) 556; *Hearns v. Waterbury Hospital*, 66 Conn. 98; *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 52 L. R. A. (N. S.) 505; *People ex rel. v. Society of New York Hospital v. Purdy*, 58 Hun 386, 12 N. Y. Supp. 307, 126 N. Y. 679; *Hodern v. Salvation Army*, 139 Am. St. 899; *Taylor v. Protestant Hospital Assn.*, 85 Ohio St. 90, 30 L. R. A. (N. S.) 427; *Hill v. Tualatin Academy*, 61 Ore. 199; *Duncan v. Nebraska Sanitarium Benv. Assn.*, 41 L. R. A. (N. S.) 973.

SMALL, C.—Appeal from the Circuit Court of the City of St. Louis. This is a suit for personal injuries sustained by the plaintiff from having received a massage with carbolic acid instead of alcohol at the hospital of the defendant. The petition is as follows:

"Plaintiff states that defendant is, and at all of the time herein stated was, a corporation existing under the laws of the State of Missouri, located and doing business in the City of St. Louis and maintaining and operating a hospital for the care and treatment of the sick.

"Plaintiff states that heretofore, to-wit, during January and February, 1914, she was sick and a patient at said hospital of defendant, and that part of the treatment administered to her consisted of daily alcohol rubbings or massages by one of the attending nurses.

"And plaintiff states that on, to-wit, the 2nd day of February, 1914, one of said nurses, desiring an additional supply of alcohol, applied to the proper representative and attendant of defendant therefor, said representative being one of the internes at defendant's said hospital, and that such representative carelessly and negligently filled up the bottle of the nurse with carbolic acid instead of alcohol.

"That owing to the similarity in appearance, such substitution was not discovered by such nurse, and that thereafter the nurse undertook to give plaintiff the usual alcohol rub or massage, and in consequence of the action aforesaid of defendant, through its said representative, in filling the bottle used by the nurse with carbolic acid instead of with alcohol, a large quantity of carbolic acid was poured on and against the back of this plaintiff, severely burning and injuring and wounding her and causing intense physical pain and mental anguish and suffering.

"Plaintiff states that she still suffers the effects of said carbolic-acid burns and wounds, and that in all probability she will continue to suffer therefrom permanently hereafter.

"That by reason of the premises she has been damaged in the sum of ten thousand dollars, for which, with costs, she prays judgment against defendant."

The answer was as follows:

"Comes now the defendant, the Deaconess Hospital, and for answer to the plaintiff's petition herein, says:

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“That it, said defendant, is an eleemosynary corporation, organized and doing business under and by virtue of the laws of the State of Missouri, and created and existing particularly under and by virtue of the provisions of the statute as shown in Article 10, Chapter 33, Revised Statutes of Missouri 1909, entitled, ‘Benevolent, Religious, Scientific, Educational and Miscellaneous Associations;’ that said defendant corporation is a benevolent and charitable association or corporation and is not incorporated for profit; and that by reason of the premises defendant is not liable for the alleged or pretended injuries described in the plaintiff’s petition.

“And said defendant for further answer denies each and every allegation in said petition contained.

“Wherefore, said defendant having fully answered, asks to be dismissed with its costs in this behalf most wrongfully sustained.”

The reply was a general denial. The plaintiff’s testimony tended to show the following state of facts:

The plaintiff, a married lady, living in St. Louis, being ill in January, 1914, was attended by Dr. Francis Reder, as her physician. At his suggestion on January 21, 1914, she went to the hospital of the defendant and remained there until February 28, 1914, and was there attended by her said physician. She employed and paid two special nurses, Beatrice Francis by day and Anna Schmidt by night. For her room and board at the hospital she paid defendant \$15 a week. The hospital had a pharmacy at which she purchased bandages, medicines and alcohol, for which she paid. She paid each of her nurses \$25 per week, and paid the hospital \$7 a week for the board of each nurse. She also paid Dr. Reder who attended her. She received no free treatment, medicines, or attention whatever, but, as far as the evidence shows, she paid the full regular price for all she received at the hospital. About midnight, February 2, 1914, her night nurse, Miss Schmidt, undertook to massage the plaintiff’s back with alcohol, as she had done before, in pursuance of instructions from Dr. Reder. The nurse poured something

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into her hand out of a bottle and applied it to plaintiff's bare back, and as the nurse did so, the plaintiff gave out a scream and the nurse said: "My God! It is carbolic acid I have used." The plaintiff was severely burned by the acid. The nurse's hands were also burned.

In addition to the expenses already mentioned, the plaintiff paid the hospital for the use of the operating room for two operations performed upon her, \$5 for the first operation, and \$10 for the second.

The night nurse, Miss Schmidt, did not testify, nor was her deposition taken. At the time of the trial she resided at Cairo, Illinois.

The day nurse, Miss Francis, testified that on the day plaintiff was injured, she was on duty, her hours being from seven in the morning until seven in the evening, and Miss Schmidt's from seven in the evening until seven in the morning. That she used alcohol for "rubs" which she gave the plaintiff; that she got the alcohol at the drug department at the hospital in an eight-ounce bottle marked, "Alcohol." On February 2, 1914, the day plaintiff was burned, she took this bottle to the hospital pharmacy to get it filled with alcohol. The druggist was off duty and she testifies: "Dr. Young, the interne or house physician, had charge of the drugs. I asked him for alcohol, and handed him the bottle. He filled it with something which had the same color as alcohol. It was light in appearance. I took it to the plaintiff's room and put it on the dresser in its usual place. I did all in the usual way. Alcohol and carbolic acid resemble each other very much in looks. When I left duty that evening Mrs. Nicholas had no burns on her person. I saw her again the next morning between seven and eight o'clock, and her whole back was burned by carbolic acid. I could tell that by the color of the burns and the odor of what was in the bottle. I did not know at the time that Dr. Young had put carbolic acid in the bottle."

For defendant, Dr. Francis Reder, testified that plaintiff's burns were superficial, except near the lower part of the spine, where they were deeper than superficial. He spoke to Sister Magdelane about the nurses

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for the plaintiff, and she assigned Miss Francis and Miss Schmidt. He prescribed alcohol rubs and not carbolic acid. Plaintiff was burned with carbolic acid.

Defendant was incorporated by a decree of the Circuit Court of the City of St. Louis March 18, 1891, in which the court adjudged that its articles of agreement "come properly within the purview of Article X, of Chapter 42, R. S. Mo. 1889," relating to Benevolent, Religious, Fraternal, Beneficial, etc., Associations. The articles of association of defendant, which were executed by seventy citizens of St. Louis, together with the decree of incorporation, were introduced in evidence by the defendant. The object and membership of the association are therein stated, as follows:

"Article II. Object. It is the object of this association: 1st. To nurse the sick and to exercise care for poor and aged by deaconesses, i. e. theoretically and practically trained Christian nurses. 2nd. To found and support a deaconess home where deaconesses shall be educated and trained, and from which they shall be sent as nurses, and where sick and aged, under circumstances provided by By-laws, may be admitted and receive attendance.

"Article III. Membership. 1st. Every Protestant Christian whose belief is in conformity with the creed of the apostles, and who agrees to fulfill the regulations of this association, is welcome as a member. 2nd. The duties of members are: a. To attend the meetings of the association as regularly as possible. b. To be active for the growth and promulgation of the association. c. To pay in advance an annual fee of at least two dollars. 3rd. Any person, being proposed in writing by a member, may become a member of the association if admitted by a vote of a majority of the board of directors."

Among other things, Article VI provided for annual meetings, and stated: "This meeting shall be of a religious character in which deaconess work shall be set forth by one or more speeches . . . 4th. Every

meeting shall be opened and dismissed with prayer and conducted in a manner corresponding to the Christian charity work of this association."

Article IV provided: "The management of this association shall be by a board of directors consisting of twelve persons," four ministers, four laymen and four ladies, who shall have been members of the association at least one year.

Article V provided for a president, vice-president, recording secretary, secretary of finance, and a treasurer. The secretary of finance was required to collect the dues of the members and turn over the money to the treasurer. The treasurer was made custodian of the association's funds and was required to execute bond at the option of the directors that he "will faithfully fulfill the duties of his office and account for and pay over as directed by the board of directors, all funds which may come into his hands. He shall keep an account of receipts and expenditures and make payments only when orders for the same carry the joint signatures of the president and recording secretary, and at the termination of the year he shall submit a statement of finance to the board of directors." A home committee chosen from the board of directors was provided for, who, with others, should examine all applications for admittance to the Deaconess Home and then submit the same to the board of directors for decision.

The manager of the hospital testified for defendant that the funds of the hospital were derived from dues of members, donations from churches and private persons, and from the Hospital Saturday and Sunday Association, also from pay patients. Patients who do not pay were also received. In 1914 there were 395 free patients, and 1521 pay patients. The money of the association was expended under his supervision. It was paid out for salaries, medicines and for operating the hospital. They always had some charity patients. There were no dividends paid and no salaries, except to those in the hospital. They took patients whether such



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patients could pay or not, and they had the benefit of the medicines and nursing, and if admitted as charity patients were not expected to pay. The superintendent or manager received a salary of \$1400 per annum. The house physician received \$50 per month and room and board. The deaconesses received no salaries, but they got a monthly allowance of pocket money. The income for the year ending September 30, 1914, was from pay patients \$60,387.45, including sums paid for drugs, dressing and operating room; income from other sources, including membership dues and donations, was \$5,844.42. Total expenditures during the same time in operating and maintaining the hospital, was \$62,021.29. The excess of income over expenditures was \$4,210.58. A statement was also put in evidence showing that defendant owned a building, furniture and equipment worth \$158,012.77, and accounts receivable and supplies on hand \$8,090.07, and was owing \$14,362.74.

Dr. Young, who Miss Francis testified, was in charge of the pharmacy department in the absence of the druggist and was an interne or house physician at the hospital, and who filled the bottle for her, as she thought, with alcohol, was not called as a witness, nor did he testify by deposition.

At the close of all the evidence, the court, at the instance of defendant, sustained a demurrer to the evidence. The jury rendered a verdict for the defendant, and the plaintiff brought the case here by appeal.

I. We hold that defendant under its articles of association is a charitable organization. The purposes of its organization are: "1st. To nurse the sick and to exercise care for poor and aged by deaconesses, i. e. theoretically and practically trained Christian nurses. 2nd. To found and support a deaconess home, where deaconesses shall be educated and trained, and from which they shall be sent as nurses, and where sick and aged persons, under circumstances provided by By-laws, may be admitted and receive attendance." The members were required to be

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Protestant Christians, whose belief is in conformity with the creed of the apostles, and they were to attend the meetings of the association as regularly as possible and be active for its growth. Every meeting was required to be opened and dismissed with prayer and conducted in a manner corresponding to the Christian charity work of the association. There were no shares of stock, no provision for making any profits for its members; but, on the other hand, each member was required to pay two dollars annual dues to support the association. It is true, there was a board of directors, composed of ministers, laymen and ladies, who had the management of the association and the disposition of its funds; but this was not intended to give the power to the board to distribute any funds to its members as profits, or otherwise, but to manage and dispose of its funds to carry out the benevolent and charitable objects of its incorporation. The owners of the corporation, i. e., its members, could receive no personal benefit or advantage whatever from their connection with the association, save the satisfaction that comes to human beings from doing or attempting to do something to relieve the sick and the suffering. The services rendered by the members in promoting the growth of the association, managing the hospital and deaconess home, were furnished *gratis*, and so were the funds they paid in as dues. The charitable character of the defendant clearly appears from its articles of association, wherein its work is expressly referred to as Christian charity work, and was, therefore, for the court to pass upon, and not for the jury.

The parol evidence introduced by the defendant was not necessary to show defendant's charitable character, but it did not disprove it. The fact that a large part of its revenue was derived from pay patients, in no wise destroyed defendant's character as a charity, because, such funds, as well as those received from dues and donations, were held in trust by it for the charitable and benevolent purposes of its organization. [Adams v. University Hospital, 122 Mo. App. 675, l. c. 687-8;

Whittaker v. St. Luke's Hospital, 137 Mo. App. 116; Powers v. Mass. Homeopathic Hospital, 109 Fed. 294; McDonald v. Mass. General Hospital, 120 Mass. 432; Gable v. Sisters of St. Francis, 227 Pa. St. 254; Jensen v. Maine Eye & Ear Inf., 107 Me. 408; Downes v. Harper Hospital, 101 Mich. 555; Hospital v. Ross, 12 Clark & F. 507; Cunningham v. The Sheltering Arms, 119 N. Y. Supp. 1033; Pepke v. Grace Hospital, 130 Mich. 493; Parks v. N. W. University, 218 Ill. 381, 2 L. R. A. (N. S.) 556; Hearn v. Waterbury Hospital, 66 Conn. 98; Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 52 L. R. A. (N. S.) 505; Hordern v. Salvation Army, 139 Am. St. 889; Taylor v. Protestant Hospital Assn., 85 Ohio St. 90; Duncan v. Nebraska Sanitarium Benev. Assn., 41 L. R. A. (N. S.) 973; and 6 Cyc. p. 974; Wharton v. Warner, 135 Pac. (Wash.) 235; Abston v. Waldon Academy, 118 Tenn. 24; St. Paul's Sanitarium v. Williamson, 164 S. W. (Tex.) 39; Fordyce v. Woman's Natl. Lib. Assn., 79 Ark. 550.]

II. The defendant being a charitable organization, is not liable for injuries caused to its patients by the negligence of its trustees, servants or employees. Authorities, *supra*.

Liability for  
Negligence.

In none of the decisions above noted is the exemption of charitable institutions from the rule of *respondeat superior* more clearly and satisfactorily set forth than in the two opinions from our own Courts of Appeal to which we have referred. In *Adams v. University Hospital*, 122 Mo. App. 675, ELLISON, J., delivering the unanimous opinion of the court, cites and reviews, *in extenso*, the decisions in this country and in England, and shows that ever since the decision of the House of Lords, in the case of *Heriot's Hospital v. Ross*, 12 Clark & F. 507, the law has been firmly established by the great weight of authority, that the funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted nor absorbed by claims arising

from the negligence of the trustees or their employees in administering the trust or charity. In *Whittaker v. Hospital*, 137 Mo. App. 116, *Goode, J.*, delivering the opinion of the court, again thoroughly examines and considers the question and thus announces the law (l. c. 120): "Two rules of law, both founded on motives of public policy, come into conflict here; the rule of *respondeat superior* (or if not technically that, one akin to it) and the rule exempting charitable funds from executions for damages on account of the misconduct of trustees and servants. As both rules rest on the same foundation of public policy, the question is whether, on the facts in hand, the public interest will best be subserved by applying the doctrine of *respondeat superior* to the charity, or the doctrine of immunity; and we decided this cause for respondent because, in our opinion, it will be more useful on the whole not to allow charitable funds to be diverted to pay damages in such a case; and, moreover, the weight of authority is in favor of this view, as expressed not only in cases where the party seeking damages were patients in the institution, but where they were not."

We are satisfied with these pronouncements of our Courts of Appeals, and hold that they announce the true rule of law to be applied in such cases.

III. But, it is urged, that the plaintiff in this case was not a charity patient, and that she paid for all the services rendered and supplies and medicines furnished her by the defendant. This was also true in all of the many cases cited (except three or four), *supra*, but this fact was held immaterial and to give the plaintiff no greater right to divert a trust fund, than if she had been a charity patient. On this phase of the case, in *Adams v. University Hospital*, 122 Mo. App. l. c. 679-80 (in which case the plaintiff was a pay patient), the court says:

"So it may be said that any citizen who accepts the service of such institution (it making no difference

whether in a special instance he pays his way) does so upon the ground, or the implied assurance, that he will assert no complaint which has for its object, or perhaps we should say, for its result, a total or partial destruction of the institution itself."

Many of the cases cited from other states, *supra*, place their ruling on the same ground. Others give the reason, as stated by the New York Court of Appeals, in *Schloendorff v. Society of N. Y. Hospital*, 211 N. Y. l. c. 129: "Such payment is regarded as a contribution to the income of the hospital, to be devoted like its other funds, to the maintenance of the charity."

But they all agree that a pay patient stands on the same footing and no better, than a patient that does not pay.

IV. There is nothing contrary to the conclusion we have reached, in *Phillips v. Railroad Co.*, 211 Mo. 419, or *Brennan v. Cabanne Methodist Episcopal Church*, 192 S. W. 982. In the *Phillips* case—not the hospital, but the railroad company itself was sued—and this court held the railroad company liable for the negligent treatment of a patient by a physician at the hospital, on the ground that the railroad company substantially operated and maintained the hospital, not as a charity, but, in effect, for its own purpose and protection, and the hospital association was the mere agent of the railroad company. In the case of *Brennan*, the plaintiff alleged that he was injured by a negligent defect in a building owned by defendant, which it used for religious and "*other public assemblages*." The lower court sustained a demurrer. We held it erred in so doing, because the petition showed the defendant might own property to be used for divers purposes not charitable nor religious, although organized under the Benevolent Association Act, and the petition alleged that defendant's house was, in fact, used for more than religious purposes. We said, 192 S. W. l. c. 984:

"If the defendant desires the court to pass upon the question as to whether or not a religious corporation is

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a charitable organization, which is not liable, it will have to get the matter here in such shape that such will be the question for actual determination.”

In the case at bar, the introduction in evidence of the defendant's articles of association and decree of incorporation brings the question as to the charitable character of defendant and the use of its property as a hospital, fairly before us for actual determination, and we have determined that under its articles it is a charitable institution, and there is nothing shown by the oral testimony that in its actual operation and management it in any way departs from the charitable character and purpose of its organization, as shown by its articles of association.

There are other questions suggested in the very able briefs of counsel on each side, which, however, it is not necessary to determine.

The result is, we concur in the ruling of the circuit court. Let the judgment be affirmed. *Brown* and *Ragland, CC.*, concur.

PER CURIAM:—The foregoing opinion of SMALL, C., is adopted as the opinion of the court. All of the judges concur.

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THE STATE ex rel. RAY McKEE, Collector of the Revenue, v. ALBINA C. CLEMENTS, Appellant.

Division One, March 2, 1920.

1. **TAXES: Assessed in Name of Another.** Sections 11374 and 11385, Revised Statutes 1909, must be read together, and when that is done they make the taxes a charge on the land under all circumstances, regardless of who the owner or prior lienors may be, regardless of the name or names in which the land is assessed, and regardless of any error or omission in that respect. So that where the owner was Albina C. Clements, and she had purchased a part of the land and acquired the balance by the will of C. C. Clements, and the deed and will had been recorded long before the assessments were made, an assessment made in the name of C. C. Clem-

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ents as the owner did not invalidate the taxes, and her duty to pay them was just the same as it would have been had the assessments been made in her own name.

2. ———: ———: **Owner's Remedy.** The statutory corrective for the failure of the assessor to discharge his duty in carefully entering the names of the owner in the "real estate book" is an action on his bond. The validity of the assessment is in no wise dependent upon his failure to use diligence to ascertain the name of the owner at the time the assessment is made.
3. ———: ———: **Notice.** An assessment of land or lots in numerical order, or by plats and a "land list" in alphabetical order, in the manner prescribed by the statutes, imparts notice to the owner that the land is assessed and liable to be sold for the taxes chargeable thereon; and, when so assessed, the actual owner is not prejudiced because it was assessed in the name of another.

Appeal from Greene Circuit Court.—*Hon. G. A. Watson,*  
Special Judge.

**AFFIRMED.**

*Charles J. Wright and McLain Jones* for appellant.

(1) The certified copy of the back-tax bill made out in the name of Albina C. Clements was not admissible as evidence, for the reason that the assessment of the lands sued upon for the years mentioned in said petition were not assessed to the said Albina C. Clements, and the back-tax bill as offered as prima-facie evidence must substantially conform to the back-tax book and the back-tax book as offered in evidence showed the land assessed for the years in controversy in this proceeding to be assessed to C. C. Clements. Secs. 11372, 11498, R. S. 1909; State ex rel. v. Scott, 96 Mo. 72. (2) The law requires a valid assessment of the land to the true owner. *Yender v. Wheeler*, 9 Tex. 408; *Vestal v. Morris*, 39 Pac. 96; *Johnson v. McIntire*, 4 Ky. (Bib.) 295; *Redmond v. Banks*, 60 Miss. 293; *Sutton v. Calhoun*, 14 La. Ann. 209. A valid assessment of the property to the true owner, and notice of the judgment rendered against him, are indispensable to the validity of a tax title. *Abbott v. Lindenbower*, 42 Mo. 162. The assessment must be made against the own-

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er when known. Not against the property, and must be as certain to him as with respect to anything else. *Kelsey v. Abbott*, 13 Cal. 609. "If the assessment is void the tax is void." *City of Hannibal v. Bowman*, 98 Mo. App. 103. A failure to properly assess the property renders the tax void, and all proceedings to enforce it are nullities. *Phelps v. Brumback*, 107 Mo. App. 16. A tax deed made in pursuance of an assessment against one who is not by the records shown to be the owner at the time is void. *Brown v. Hartford*, 173 Mo. 183; *Wilson v. Fisher*, 172 Mo. 10; *State ex rel. v. Burroughs*, 174 Mo. 70; *Hubbard v. Gilpin*, 57 Mo. 441. (3) Statutes requiring real estate to be listed and assessed in the name of owner are mandatory and not merely directly, and assessment, made in the name of one, who is not the owner of the property, when the true owner is known or, by the exercise of ordinary care, could be discovered, is generally void, and will not support any proceedings for the enforcement of the tax, unless such errors are cured by statute. *St. Louis v. Wenneker*, 145 Mo. 230; *Jackson v. Mack*, 74 Mo. 61; *Hein v. Wainscott*, 46 Mo. 145; *Abbott v. Lindenbower*, 42 Mo. 162.

*Fred A. Moon* for respondent.

(1) Each tract of land is chargeable with its own taxes, no matter in whose name it may have been assessed. Sec. 11385, R. S. 1909; *State ex rel. v. Hurt*, 113 Mo. 93; *Cape Girardeau v. Bunough*, 112 Mo. 559. The law as contended for by appellant and as laid down in *Abbott v. Lindenbower*, 42 Mo. 162, was changed by the adoption of the foregoing statute in 1872. Laws 1872, p. 124. (2) When respondent showed that property was duly assessed and taxes levied and extended on the tax books, and that they remained unpaid, it was entitled to judgment, regardless of the tax bills. The suit is not founded on the back tax bills. *State ex rel. Miller v. Hutchinson*, 116 Mo. 402; *State ex rel. v. Bank*, 144 Mo. 386. (3) At an early date in the state under statutes then in force, some of the objections here urged by the defendant might have



been valid, but the more liberal statutes of recent years and the decisions of this court construing them deprive these various assignments of all force. State ex rel. v. Wilson, 216 Mo. 286.

RAGLAND, C.—This is a suit by the State, at the relation and to the use of the City Collector of the City of Springfield, to enforce the State's lien for certain delinquent taxes which had been assessed against two distinct parcels of land in said city and which were due in the years 1911, 1912 and 1913, respectively. The assessor's books offered in evidence at the trial showed that both tracts had been assessed in the name of one C. C. Clements and that all the taxes in controversy were based on such assessments. It was stipulated that the defendant at the time of the several assessments was the owner of both tracts; that she acquired tract 1 by the will of Dr. C. C. Clements, which was duly probated and thereafter recorded in the proper office January 5, 1906; and that she purchased tract 2 with her separate means in 1887, taking the title in her own name and duly recording the conveyance thereof. It was also admitted by defendant that the taxes sought to be collected by this proceeding were unpaid and that they constituted valid liens against the respective tracts of land described in the petition, unless the assessments in the name of C. C. Clements on which they were based rendered them invalid.

The court found the issues for the plaintiff and rendered judgment accordingly. From the judgment so rendered defendant appeals.

I. The only question for decision is whether the assessments were invalid because not made in the name of the owner of the land. The City of Springfield during the years in which the several assessments were made was organized as a city of the third class. The statute then governing such cities required the city assessor jointly with the county assessor to assess all property in such city both real and personal, and that the assessments of city property, as made

by the city and county assessors, respectively, should conform to each other. The ordinances of the City of Springfield relating to the assessment of property are not before us, but it should be presumed that they conform to the statutes in respect thereto. Both parties have briefed the case on the theory that the general statutes of the State governing the assessment of lands for taxation are controlling. In disposing of the question under consideration we will accord them such effect.

II. In prescribing the manner of making that part of the assessor's book denominated the "land list," Section 11372, Revised Statutes 1909, provides that all lands "shall be placed in the 'land list,' with the owner's name, if known, and if not, then the name of the original patentee, grantee or purchaser from the Federal Government, . . . opposite thereto."

**Assessment.** Section 11374, applicable to counties having a population of 40,000 or more, such as the one in which the City of Springfield is located, requires that the assessor be provided with a "real estate book" which shall contain all lands subject to assessment, that the book shall be tabular in form with suitable captions and separate columns, and that the first column shall contain the name of the owner or owners, if known, if not, the name of the party who paid the last tax; if no tax has ever been paid, then the name of the original patentee, etc. *In pari materia* with the foregoing sections, is Section 11385, which is as follows:

"Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a 'land list' in alphabetical order, as provided by Sections 11372 and 11373, shall be deemed and taken in all courts and places to impart notice to the owner or owners thereof, whoever or whatever they may be, that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; and no error or omission in record to the

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name of any person, with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes."

Read and construed together the three sections seem to mean, that land shall be assessed in the name of the owner, if known; if not, in the name of the party who paid the last tax; if no tax has ever been paid, then in the name of the original patentee, etc., but each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed, and no error or omission in regard to the name of any person, with reference to any tract or lot, shall in anywise impair the validity of the assessment thereof for taxes. It is said that a tax is assessed against the owner, that he and not his property pays the tax, and that the property is resorted to merely for the purpose of ascertaining the amount of the tax. [Gitchell v. Kreidler, 84 Mo. 472; State ex rel. v. Snyder, 139 Mo. 549.] Yet such tax so far as it is assessed against him on account of his ownership of real estate cannot be recovered as and for a debt owing from him in an action at law. [Carondelet v. Picot, 38 Mo. 125.] Under our system there are but two methods of collecting a real-estate tax. One is a distraint of the owner's personal property, and the other is the enforcement of a lien on the real estate on account of which the tax is assessed. It may be conceded that such a tax could not be collected by distraint of the owner's personal property, unless it was assessed against him, that is, unless the land was assessed in the owner's name, but, so far as the creation of a lien on the land is concerned, it is immaterial in whose name it is assessed. By said Section 11385 each tract of land is chargeable with its own taxes no matter who the owner is or in whose name assessed. The assessment of land or lots in numerical order, or by plats and a "land list" in alphabetical order, as provided by preceding sections, imparts notice to the owner that it is assessed and liable to be sold for the taxes chargeable thereon. This and related sections

make the taxes *a charge on the land* under all circumstances, regardless of who the owner or prior lienors may be, regardless of the name or names in which it is assessed, and regardless of any error or omission in that respect. What is here said has no reference to the enforcement of the lien by suit. The determination of necessary parties thereto rests upon other considerations. [Meriwether v. Overly, 228 Mo. l. c. 250; Paving Co. v. Realty Co., 199 Mo. App. l. c. 244.]

Abbott v. Lindenbower, 142 Mo. 162, was decided before the enactment of Section 11385. [Laws 1872, p. 124.] In St. Louis v. Wenneker, 145 Mo. 230, the tax bills were declared void because the underlying assessment had not been made, nor had it been *intended* to be made, *in the name of any one*. We see no reason for extending or enlarging upon the holding made in that case, when to do so would plainly violate both the letter and the intent of the statute. [Cape Girardeau v. Burrough, 112 Mo. 559; State v. Hurt, 113 Mo. 90.]

There is no question here of the failure of the assessor to use diligence to ascertain the name of the owner at the time he made the assessment; the validity of the assessment is not dependent upon that. Whose, if any one's, dereliction caused the error or omission is wholly immaterial. The statutory corrective for the failure of the assessor to discharge his duty in carefully entering the names of the owners in the "real estate book" is an action on his bond. [R. S. 1909, sec. 11375.] Defendant knew that taxes had been assessed against her lots, that they had not been paid, and that the amount thereof was easily ascertainable. She was in no respect prejudiced because they were assessed in the name of another.

The judgment should be affirmed. It is so ordered. *Brown and Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

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**WILLIAM L. CROSBY, Appellant, v. MARY F. EVANS  
and SUSIE E. EVANS.**

**Division One, March 2, 1920.**

1. **PRACTICE: Further Evidence After Demurrer.** To permit plaintiff to introduce further evidence after he has rested and after a demurrer to the case as then made has been argued is a matter within the trial court's discretion.
2. **COVENANTS: In Deed and Mortgage.** A vendee who secures payment to his vendor of the price of his purchased property by mortgaging back with covenants the estate granted, does not thereby release the vendor from liability on his similar covenants.
3. ———: ———: **Running With the Land.** The covenant of indefeasible seizure runs with the land when the deed containing it passes any interest to carry the covenant along, the purpose being to enable a remote grantee substantially damaged by the breach to recover his damage; but a purchase-money mortgage or deed of trust, given by a grantee who suffers from his grantor's broken covenant, does not carry back to the grantor the right to sue on the covenants in the original deed or cancel those covenants.
4. ———: ———: **Estoppel: Damages.** The grantee in a deed who gives back a deed of trust for the purchase money, containing similar covenants, does not estop himself thereby to sue on the covenants in the deed when a substantial breach occurs which damages him, nor create in the grantor a right to sue.
5. ———: **Foreclosure of Deed of Trust by Agreement: Grantee's Right to Damages for Breach.** The grantee, who gave a deed of trust back to secure the purchase money, did not lose his right to recover damages for breach of the covenants contained in his deed, if default in payment and foreclosure sale by the trustee occurred pursuant to a scheme arranged between said mortgagor and said mortgagee that the mortgagee was to buy in order to cure a fault in said mortgagor's title for which the mortgagee was liable on his covenant.
6. ———: ———: ———: **Subsequent Sale.** And where the agreement was that the deed of trust should be foreclosed and the property bought by the mortgagee in order to perfect title in the mortgagor, but the mortgagee, having purchased at the sale, conveyed to a third party, thereby cutting off the mortgagor's title, the mortgagor is entitled to maintain an action for breach of the

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covenant contained in the deed to him as grantee and recover the amount of purchase money paid by him after his eviction by such subsequent grantee.

7. ———: ———: ———: **Interest.** The mortgagor, in his action for damages for breach of covenants, is entitled to interest on money paid on the purchase price, only from date of eviction, and not from date of the payments, if he was meantime in possession and was not answerable over to any one for rents and profits.
8. ———: ———: ———: **Reply: Departure: Confession and Avoidance.** Where the defense set up in the answer to an action for damages by the grantee for breach of covenants in a deed, is that the plaintiff lost his right to sue as the result of the sale under the purchase-money deed of trust, a replication pleading, by way of confession and avoidance, an agreement that the property should be sold by the trustee in order to perfect the title in the defendant, does not state a new cause of action, and is not a departure, unless the agreement was a contract substituted for the covenants.
8. **JURY: Irregular Summons.** An irregularity in summoning talesmen for the jury, no prejudice appearing, is not reversible error.

Appeal from Greene Circuit Court.—*Hon. Arch A. Johnson*, Judge.

REMANDED (*with directions*).

*U. G. Johnson* and *Warren L. White* for appellant.

(1) The answer states no defense. It is true that covenants of seizing and of warranty run with the land in this State, and inure to the subsequent grantee upon whom loss falls. *Coleman v. Lucksinger*, 224 Mo. 15; *Allen v. Kennedy*, 91 Mo. 331; *Dixon v. Desire*, 23 Mo. 151. But this rule is not applied to a mortgage given for the purchase money. (a) Where a conveyance is made with such covenants and a mortgage with like covenants is given for the purchase money, the mortgagor is not estopped by his covenants to sue on the vendor's covenants, nor does the vendor absorb all right by virtue of the mortgage back to him. And this is true in those states where the mortgagee taxes the title instead of mere lien. *Connor v. Eddy*, 25 Mo. 72; *Randall v. Lower*, 98 Ind. 258; 12 Cent. Digest, 122,

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Title Covenant, sec. 75; Hubbard v. Norton, 19 Conn. 422; Hardy v. Nelson, 27 Maine, 525; Rawle on Covenants, secs. 217, 219; Resser v. Carney, 54 N. W. (Minn.) 89; Haynes v. Stevens, 11 N. H. 34. (b) A foreclosure of the purchase money mortgage, by the vendor, where he purchases at the foreclosure sale, does not extinguish the right of action of the mortgagor for breach of the covenants in the deed to him. Resser v. Carney, 54 N. W. (Minn.) 91; Haynes v. Stevens, 11 N. H. 35; Bennett v. Vance, 3 John. (N. Y.) 363. (c) In those states where a mortgage vests the legal title in the mortgagee, a mortgage for the purchase money does not extinguish the mortgagor's right to sue on the covenants in the deed by which he acquires title. Hardy v. Nelson, 27 Me. 528; Rawle on Covenants, sec. 219, and note 1, p. 328; Bennett v. Vance, 3 Johns. 363. (2) The after acquisition of the paramount title which defendants plead is no defense. Plaintiff having failed to record his deed, defendants, after purchasing the paramount title, conveyed it to a stranger. Defendants are estopped by that act to deny liability on their covenants. Besides, defendants had foreclosed their purchase money mortgage March 31, 1910, before they bought the outstanding title at the sheriff's sale May 11 of that year, so that defense is refuted by the facts. 11 Cyc. 1122, note 76; Clark v. O'Neal, 13 La. Ann. 381; Williamson v. Williamson, 71 Me. 442; Curtis v. Deering, 12 Me. 499. (3) That the foreclosure was pursuant to an agreement to perfect the title, not a hostile one, and left plaintiff's right to redeem unimpaired, was sufficiently shown to make out a case for the jury.

*G. W. Goad and O. T. Hamlin* for respondents.

(1) The second count of defendant's answer states a complete defense to plaintiff's petition. (a) In Missouri covenants of warranty run with the land, and the right to sue upon a broken covenant of warranty passes to the grantee or assignee, who must sue in his own

name. The grantor or assignee cannot sue. *Van Dorn v. Rolfe*, 20 Mo. 455; *Dickson v. Desire*, 23 Mo. 166; *Chambers v. Smith*, 23 Mo. 174; *Vancourt v. More*, 26 Mo. 98; *Jones v. Whitsett*, 79 Mo. 191; *Hunt v. Marsh*, 80 Mo. 398; *Allen v. Kennedy*, 91 Mo. 324; *Johnson v. Johnson*, 170 Mo. 48; *Coleman v. Lucksinger*, 224 Mo. 14; *Langenberg v. Heer Dry Goods Co.*, 74 Mo. App. 20. (b) A mortgage or deed of trust on real estate is now a mere surety for the debt—is a chattel interest passing at the death of the mortgagee to the personal representatives. Therefore, a mortgagor, prior to foreclosure, continues to be the owner of the estate so long as he is permitted to remain in possession. *Woods v. Hildebrand*, 46 Mo. 286; *Pierce v. Gabbert's Adm.*, 70 Mo. App. 205; *Kennett v. Plummer*, 28 Mo. 142; *Pierce v. Iron Co.*, 49 Mo. 124; *Hardwick v. Jones*, 65 Mo. 60; *In re Life Assn. of America*, 96 Mo. 636; *Fischer v. Johnson*, 51 Mo. App. 162. The last-mentioned point and authorities fully explain the reason for the ruling in *Conner v. Eddy*, 25 Mo. 72, cited and relied on by plaintiff. (c) Plaintiff cannot claim as an excuse for defaulting in the payment of the notes secured by the deed of trust to defendants that there was a defect in the title conveyed by the warranty deed of defendants. *Cartwright v. Culver*, 74 Mo. 179; *Hunt v. Marsh*, 80 Mo. 398; 27 Cyc. 1554, 1555. (d) Defendants conveyed to plaintiff with covenants of warranty, and plaintiff conveyed back to defendants with like covenants of warranty. These covenants cancel each other. *Dervin v. Hendershott*, 32 Iowa, 192; *Stephens v. Winship*, 11 Am. Dec. 182; *Hatch v. Kimball*, 14 Me. 9; *Goodall v. Bennett*, 22 Wis. 565; *Green v. Edwards*, 15 Tex. App. 382; *Eveleth v. Crouch*, 15 Mass. 307; *Carroll v. Carroll*, 113 Iowa, 419; *Willis v. McGough & Co.*, 56 Ga. 198; *Field v. Willingham*, 49 Ga. 345; *Brown v. Metz*, 33 Ill. 339; *Silvermann v. Silvermann*, 104 Ill. 137; 11 Cyc. 1094. (2) If it be determined that plaintiff still had a right to sue notwithstanding the foreclosure of the deed of trust which divested him of all



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title, or that defendants acquired the land at said foreclosure sale in trust for the use of plaintiff, then the after acquired title of defendants at the sheriff's sale June 11, 1910, by virtue of their warranty deed to plaintiff June 10, 1907, inured to and vested in plaintiff and no damages for breach of covenant can rise. *Boyd v. Haseltine*, 110 Mo. 206; *Cocrill v. Bane*, 94 Mo. 444; *Johnson v. Johnson*, 170 Mo. 34; *Cartwright v. Culver*, 74 Mo. 179; *Hunt v. Marsh*, 80 Mo. 398; *Crumb v. Wright*, 97 Mo. 19; *R. S. 1909*, sec. 2871; *Reese v. Smith*, 12 Mo. 344; *Collier v. Gamble*, 10 Mo. 466; *Bank of Utica v. Merservan*, 49 Am. Dec. 197; 11 Cyc. 1137. (3) Defendants' motion to strike out plaintiff's reply should have been sustained. (a) Plaintiff's petition is an action at law for breach of covenant. The reply is an action in equity to declare a trust based on a written agreement. These two causes of action should have been alleged in the petition, not one in the petition and the other in the reply. *Mathieson v. Railroad*, 219 Mo. 552; *Moss v. Fitch*, 212 Mo. 502; *Hill v. Mining Co.*, 119 Mo. 30; *Jackson v. Powell*, 110 Mo. App. 252; *Stepp v. Livingston*, 72 Mo. App. 179; *Crawford v. Spencer*, 36 Mo. App. 82; *Lanity v. King*, 93 Mo. 519; *Rhodes v. Lumber Co.*, 105 Mo. 313; *McMahill v. Jenkins*, 69 Mo. App. 281; *Milliken v. Commission Co.*, 202 Mo. 654; *Mahoney v. Reed*, 40 Mo. App. 99; *Cement Co. v. Ullman*, 159 Mo. App. 254; *Roving Fork Co. v. Produce Co.*, 193 Mo. App. 658; *Mahoney v. Reed*, 40 Mo. App. 109. If plaintiff desired to shift his ground he should have done so by amending his petition. *Randolph v. Frick*, 57 Mo. App. 405. Said cause of action should be separately stated, separately tried, one by the chancellor and one by a jury. *McHoney v. Ins. Co.*, 44 Mo. App. 426; *Zeidman v. Molasky*, 118 Mo. App. 123; *Young v. Coleman*, 43 Mo. 179; *Jones v. Moore*, 42 Mo. 413. (b). A reply cannot be used in aid of the petition to introduce for the first time a new cause of action or an additional cause of action, nor to engraft on the petition a material allegation omitted therefrom. *Rhodes v. Lum-*

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ber Co., 105 Mo. App. 313; McMahon v. Jenkins, 69 Mo. App. 281; Hill v. Mining Co., 119 Mo. 30. (4) Defendants' demurrer to the evidence at the close of plaintiff's case should have been given, as the evidence failed to establish the terms and conditions of the alleged last written agreement set up in plaintiff's reply. (a) The conversation of Geo. W. Evans with the witnesses, U. G. Johnson and A. W. Lincoln, had long prior to the date of said alleged written agreement, is no evidence of the subsequent written agreement. Gorham v. Auerswold, 53 Mo. App. 131; Conrad v. Fischer, 37 Mo. App. 376; Johnson Co. v. Wood, 84 Mo. 489; Bignal v. Pierce, 59 Mo. App. 673; Taylor v. Iggs, 26 U. S. 591, 7 L. Ed. 275; Richard v. Robbins, 124 Mass. 105. (b) If an agreement can be inferred from the facts related by the witnesses Johnson and Lincoln, and a subsequent written agreement inferred from that agreement then we have an inference based on an inference—a presumption on a presumption which is prohibited by law. Wulfig v. Cork Co., 250 Mo. 723. (c) The witness Goad testified only as to the fact that a written agreement was entered into regarding the sheriff's sale. There was no evidence that any written agreement (or any other agreement) was ever made regarding the foreclosure sale of the deed of trust, although such agreement must be shown to have not only been made, but its contents proven by full, clear, strong and convincing evidence. Bennett v. Walker, 23 Ill. 97; Peters v. Worth, 164 Mo. 439; Cunningham v. Railroad, 61 Mo. 36; 17 Cyc. 778; 25 Cyc. 1627; 3 Wigmore on Evidence, sec. 2105, p. 2845. (5) The trial court erred in submitting the cause of action alleged in plaintiff's reply to a jury. The same should have been tried by the chancellor. McHoney v. Ins. Co., 44 Mo. App. 426; Jones v. Moore, 42 Mo. 413; Young v. Coleman, 43 Mo. 179. (6) The trial court erred in requiring the sheriff to summons five extra jurors. The court's duty to make out such list of extra jurors cannot be legally delegated to the sheriff. Laws 1911, p. 307, sec. 8. (7) Plaintiff was entitled to interest only from

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date of eviction. The instructions and verdict gave interest from date of payments. *Pence v. Gabberts*, 70 Mo. App. 209.

GOODE, J.—The defendants Mary F. and Susie E. Evans, conveyed by a warranty deed, dated June 25, 1895, recorded April 23, 1903, to George W. Evans, their father, Lot 37 in Block 3 of Hobart's Addition to the City of North Springfield (now Springfield), Missouri. On June 10, 1907, the defendants conveyed the same lot to the plaintiff, William L. Crosby, and his then wife, Jennie Crosby, from whom he was divorced in 1908. That conveyance, both parties agree, contained the covenants to be implied from the words "grant, bargain and sell;" namely, covenants that the grantors were seized, at the date of the conveyance, of an indefeasible estate in fee simple in the lot; that it was then free from incumbrance done or suffered by the defendants (the grantors) or any person under whom they claimed, and for further assurances of the title by them and their heirs to the grantees and their heirs and assigns. The statement is made by one of the parties and not contradicted by the others, that there was in said deed a separate covenant of general warranty, and that the present action is on all the covenants; but the petition, as epitomized in the abstract of record, counts on a breach of the covenant of seizin only, alleging "that at the time of the conveyance the plaintiffs [sic] were not seized of a fee simple title to the said premises, and had no title whatever to the same; but that said title was outstanding in other persons, and by reason whereof plaintiff lost possession and was ousted," etc. On June 10, 1907, the date of the deed to plaintiff and his wife, they gave a deed of trust on the lot to J. B. Johnson, trustee, to secure payment to the defendants of seventy-eight promissory notes, payable from month to month, for \$12.50 each, or \$975, representing the price of the lot (\$1000), except a cash payment of twenty-five dollars. That deed of trust contained the statutory

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covenants implied from the words "grant, bargain and sell." About one year later, and on June 29, 1908, plaintiff's former wife conveyed the lot and other lands to him by a deed containing the statutory covenants. Between the year 1895, when the defendants conveyed the premises in question to their father, George W. Evans, and June 10, 1907, when they conveyed it to plaintiff and his wife, said George W. had passed the title to George F. and Kate Baldrige, by a warranty deed, dated April 25, 1903, recorded May 22, 1903. The Baldridges attempted to give a deed of trust on the lot, dated April 21, 1903, filed May 27th the same year, to J. B. Johnson, as trustee for George W. Evans, to secure their note for \$755 to Evans; but this instrument, though signed by the Baldridges, named Evans as the grantor and, besides, was acknowledged by the Baldridges, before said trustee as a notary public. Three months later, on July 27, 1903, the Baldridges gave a deed of trust, filed July 28, same year, on the premises to Webster Edwards, trustee, to secure the payment of a promissory note for \$150 to M. L. Middleton. The last incumbrance was a lien prior to the title of the plaintiff Crosby, and was learned by him to be in 1909 or 1910, when he had agreed to sell the lot, and the title was examined by an attorney for the would-be purchaser. Meanwhile Crosby had paid installments amounting to three hundred dollars on the price he was to pay defendants. At this point there is testimony tending to show an agreement in writing was made between Crosby and George W. Evans, the latter acting as agent for defendants, by which said Evans was to have the first Baldrige deed of trust, also the one given by the Crosbys, foreclosed, and have Crosby, or the defendants for him, buy the lot at the foreclosure sales and thereby make perfect his title. Crosby was not permitted to testify about this agreement, because George W. Evans, who made it with him, had become demented; and the terms of the instrument, which had been lost, are to be gathered from oral evidence. Judge Lincoln, an at-

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torney of Springfield, testified Crosby and George W. Evans consulted him about what to do to cure the former's title after he (Lincoln) had discovered its defects, and he advised them they "had better reform that deed of trust (meaning the first Baldrige one) in the circuit court and get a foreclosure there, *and also foreclose* the other deed of trust Mr. Crosby had given; that he recommended that course for the purpose of getting the title where it would pass to Mr. Crosby. This testimony was given by Lincoln:

"Did Mr. Evans say anything about the purpose of those proceedings? Were they to clear the title? A. That was what he wanted to have done, clear up the title and give Mr. Crosby and those claiming under him a good title.

"Q. Did they talk about that arrangement in your presence? A. They did.

"Q. What was the reason for foreclosing the deed of trust that Crosby had given? A. The reason for that was to cut out the after title of Mr. Butcher and Mr. Robertson.

"Q. They had filed some conveyance for record, had they? A. Yes, sir."

Another attorney, U. G. Johnson, who then represented Middleton, said Evans officed across the hall from him and talked to him about making the agreement after Judge Lincoln had advised them, but he (Johnson) didn't know when it was made; only knew what Evans said he was going to do. Witness, among other statements, said:

"Q. You say that Evans talked to you about that matter of Crosby's? A. Yes, sir.

"Q. What did he tell you, if anything, about what he was going to do? A. His conversation to me was along this line; in the first place, he wanted to know what he could do after he found this defect. He said, 'I want to make my title good to Mr. Crosby,' and I think, maybe, I looked into it and told him he would have to foreclose, and that is what he agreed to do and he said Cros-

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by had paid him pretty regular and he wanted to make good."

George W. Goad, also an attorney, testified he drew an agreement between Evans and Crosby relating to the first Baldrige deed of trust, but that he couldn't recall the contents of the agreement; thought it was about the lot in question; involved a deed by Evans to Crosby of timber land in Dallas County; was drawn when the sheriff's sale was expected under the foreclosure judgment (to-wit, of the two Baldrige deeds of trust); didn't relate to foreclosure of Crosby's deed of trust, but was long before; was some agreement about what should be done when the property was sold under foreclosure; the agreement was signed. These questions and answers are parts of Goad's testimony:

"Q. And did it purport to measure all the rights growing out of the foreclosure sale and the rights growing out of the sale of this lot under the deed of trust? A. At that time. There had been a judgment on this Baldrige deed of trust, but the sale didn't occur for two or three months afterwards, or the next term of court.

"Q. They were friendly? A. At that time they were. *This agreement was had long prior to the foreclosing.* My recollection is the sale under the Crosby mortgage was prior to the sale under the judgment and that this agreement was long prior to both of them. . . .

"Q. Did the contract contain a recital for the consideration of the deed to Crosby and the deed in which title failed? A. I don't know.

"Q. Did it recite what payments had been made by him? A. I don't think so.

"Q. How were they to arrive at the consideration for this contract, the amount of Crosby's damage? A. I can't tell you. I know there was some insurance, some taxes and some bills, and some other things. Crosby and Evans had been negotiating some, and I think they had agreed on some sort of an arrangement that they reduced to writing. My recollection is, although I could not testify to a single line in it, but my impression is that this in-

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cluded several things that affected that property and also this judgment.

"Q. But the purpose and object was to make Crosby whole? A. Make them both whole.

"Q. And that was the interest Crosby had in it, making him whole because the title failed? A. I could not say. They had a transaction between them and I presume that written agreement was the settlement."

A foreclosure suit was brought by George W. Evans, and a sheriff's deed, dated June thirteenth and recorded December 13, 1910, made pursuant to the judgment rendered in it, by which all the interest in the lot of said Evans, the Baldridges, J. B. Johnson, the trustee in the defective Baldridge deed of trust, M. L. Middleton, the beneficiary of the second deed of trust given by the Baldridges, and Webster Edwards, the trustee named in it, were conveyed to the defendants Mary F. and Susie E. Evans.

But prior to the said sheriff's sale, and on March 31, 1910, J. B. Johnson, as trustee in the deed of trust made by the Crosbys to secure their purchase money notes, had conveyed their interest in the lot to defendants, pursuant to a sale by him on account of defaults in the payment of some of the notes. This sale occurred subsequent to the aforesaid judgment of foreclosure, but before the levy on May 11, 1910, thereunder, and, of course, before the sale on June 11th. Whether Crosby defaulted in his payments in consequence of his imperfect title and as a step toward having it made perfect, or because he had decided to abandon the property by reason of domestic troubles, or for some other reason, is an issue about which there is conflicting evidence.

After defendants had acquired title by their purchases at the sale under the Crosby deed of trust and at the sheriff's sale, and on the very day of the latter sale, they conveyed the lot by warranty deed to Allie Gray, who took possession, Crosby being then at work elsewhere and not in occupancy.

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Crosby, having been dispossessed, filed the present action for an alleged breach of the covenant of seizin, obtained a verdict for the three hundred dollars he had paid on the price of the lot and one hundred and eighteen dollars interest; but pursuant to a motion filed by defendants, the verdict was set aside and a new trial granted with no reason given for the ruling. Plaintiff appealed from the order sustaining said motion.

The defenses are these: first, a denial of all the averments of the petition, except the allegation of the execution by defendants of the deed to plaintiff and his wife, containing the aforesaid statutory covenants; second, that the deed of trust given back by plaintiff and his wife to J. B. Johnson as trustee for plaintiffs, contained the same statutory covenants as did defendants' deed to plaintiff and his wife; that plaintiff took possession under the latter deed June 10, 1907, and continued in possession to March 21, 1910; that plaintiff's title was purchased on the last date by defendants at the sale by the trustee in consequence of plaintiff's default, and he thereupon ceased to have any interest in the premises, and is not a proper party to sue in this cause; third, that prior to any eviction of plaintiff, defendants, after the execution of their deed to him, containing the covenants sued on, acquired all the title not passed to him by defendants' said deed, which title inured to and vested in plaintiff as soon as it was acquired by defendants, by virtue of their said deed and covenant of warranty to him, and he sustained no damage by any outstanding title or incumbrance.

A replication was filed which, in two paragraphs, set up, in effect, that the purchases by defendants at the two foreclosure sales aforesaid, one by the sheriff under a judgment and the other by the trustee in the deed of trust given by plaintiff and wife, were made by defendants under an agreement entered into by them through their agent George W. Evans, to buy for plaintiff's benefit and to make perfect his title, and not to buy for themselves; that they paid no consideration nor gave the plaintiff any



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credit on his secured notes, and that in disregard of their agreement, defendants conveyed the premises to Allie Gray.

The appeal went to the Springfield Court of Appeals where the judges disagreed, and one of them dissented and caused the case to be sent here, for the reason that the decision of the majority was in conflict with the decision of this court in Cartwright v. Culver, 74 Mo. 179; Hunt v. Marsh, 80 Mo. 396, and Carter v. Butler, 264 Mo. 306.

The error assigned for permitting plaintiff to introduce further evidence after he had rested and a demurrer had been argued to the case as then made, is without merit, that being a matter within the trial court's discretion. [St. Louis Pub. Schools v. Risley's Heirs, 40 Mo. 356, 370.]

Uncertain as is the evidence we have set out regarding the agreement between George W. Evans and Crosby, it tends to prove that, as defendants' agent, Evans agreed in writing with Crosby not only to have the first Baldridge deed of trust reformed and foreclosed by a decree of court, but also to have the lot sold by the trustee in the Crosby deed of trust, in order that defendants might make good their covenants to Crosby; or if the scheme failed, then to make him whole in some other way; perhaps by conveying to him land in Dallas County. Such an agreement must have included, either expressly or impliedly, an understanding by defendants to hold the property for Crosby or convey to him, if they bought at the sales. It could not have meant that they should buy for their own benefit and afterwards sell to some one else, because in so doing they would extinguish, instead of perfect, his title. The court took that view of the arrangement in instructing the jury to return a verdict for plaintiff, if they found the agreement was made; and one instruction given for defendants explicitly required the jury to find, as essential to such a verdict, that it had been agreed Evans would buy the property under the deed of the trust given by plaintiff, perfect the title and

then convey to plaintiff. The instructions touching the foreclosure are sound, unless a verdict for defendants should have been directed. That this ought to have been done is urged for several reasons, which will be considered.

Defendants say plaintiff is estopped to assert a right of action on the covenants in their deed to him and his wife, by the like covenants in the deed of trust the latter parties gave back. Otherwise stated, defendants say the covenants in the first deed ran with the land back to them or their trustee by force of said deed of trust, and this instrument having been foreclosed by a sale where defendants were the purchasers, the action for covenant broken enured to them, or rather was extinguished. But this is not the law when the second deed relied on to extinguish the right of action for a breach of the covenants in a prior one, is a mortgage or deed of trust given by a vendee to secure to his vendor the price of the land purchased. [Connor v. Eddy, 25 Mo. 72; Haynes v. Stevens, 11 N. H. 28; Smith v. Cannell, 32 Maine, 123; Sumner v. Barnard, 12 Met. 459; Hubbard v. Norton, 10 Conn. 422; Randall v. Lower, 98 Ind. 255; Resser v. Carney, 54 N. W. 89; Rawle, Covenants of Title (3 Ed.), sec. 266.] Some of those cases, including the Missouri one, decide the very question, and the others lay down principles which would compel the like ruling where a purchase-money mortgage is relied on to annul covenants in the deed of the vendor. We quote from Connor v. Eddy, 25 Mo. l. c. 75, 76:

“The plaintiff, having given a deed of trust on the lot, with covenants for title to secure the purchase money . . . is not estopped by his covenants from availing himself of any relief to which he would otherwise be entitled by virtue of the vendor’s covenants to himself. This is the law with regard to mortgages with warranty of title given to secure the purchase money of the land mortgaged, and it is as applicable, if not more so, to deeds of trust for the same purpose. The law of es-

toppel has no application in such cases. [Rawle on Cov. 348.]”

Whether supported by authority or not, and we have found none which supports it, the notion is unsound that a vendee who secures payment to his vendor of the price of the purchased property by mortgaging back with covenants the estate granted, thereby releases the vendor from liability on his similar covenants. Not one of the many cases cited by defendants for the doctrine is in point. That of *Devin v. Hendershott*, 32 Iowa, 192, decided the mortgagee could maintain an action against one who was the grantor of the mortgagor on the covenants in the deed of said grantor; which is no more than to say the covenants ran with the land to the mortgagee. In *Silverman v. Loomis*, 104 Ill. 137, the cancellation of the defendant's covenants was not in consequence of a mortgage having been given for the purchase money. A man named Runyan had conveyed the premises in question, which were mortgaged at the time, to the defendant Loomis, with a warranty against incumbrances. Loomis conveyed back subsequently with the like covenant. Runyan then sold to Silverman, who was compelled to pay the mortgage and sued Loomis on the covenant in Loomis's deed back to Runyan. The court held the conveyance and reconveyance by Runyan to Loomis mutually cancelled the covenants, and that Silverman, as grantee of Runyan, could not sue on a covenant on which his grantor could not sue. The case of *Brown v. Metz*, 35 Ill. 339, is especially stressed, but affords defendants no help. Brown and two other men had made a deed with covenants and had taken back from the grantee a deed of trust, which was foreclosed and Brown bought the property, thereby acquiring the full estate he and his co-grantors had conveyed. He then conveyed it by quit-claim deed to a grantee who, by a similar deed, conveyed to another grantee. Brown was sued on the covenants in the original deed of himself and his co-owners. The court held the estate originally granted ceased in Brown when he acquired title the second

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time and the covenants in the first deed did not run to his later grantee or assigns, as no interest created by his first grant passed by the second one, for the covenants in the first deed to run with. The facts at bar are different—would have the same effect if Allie Gray was suing defendants on the covenants in their deed to plaintiff. A Georgia case is cited wherein the defendants, who were virtually mortgagees of certain premises, were held not liable on the covenants in a deed they gave back by way of release to their grantor (in a deed intended to be a security and not an absolute conveyance) to a subsequent grantee of said mortgagor. The mortgagor could not sue on said covenants, because they were the same as he had made to the mortgagees; and, therefore, his grantee could not. [Willis v. McGough & Co., 56 Ga. 198.] A case in Iowa, also cited by defendants as apropos, was an action by a husband on the covenants in a deed made to him by his wife without consideration, he having by a deed with similar covenants reconveyed to her, which the court held released her from liability to him on her covenants. [Carroll v. Carroll, 113 Iowa, 419.] We see no pertinency in that case to the doctrine in question. In Brown v. Staples, 28 Maine, 497, a remark is made to the effect that a second covenant acts as an estoppel against an action on a prior one, or as a release of damages; but the opinion said also the doctrine of mutual cancellation does not apply so as to make the covenants in a purchase-money mortgage annul those in the deed granting to the mortgagor. Why should it? The covenant of indefeasible seizin, the one in suit, runs with the land, it is true, when the deed containing it passes any interest to carry the covenant along; the purpose being to enable a remote grantee substantially damaged by a breach to recover his damages. [Allen v. Kennedy, 91 Mo. 324, 329.] But a mortgagee cannot be damaged by a breach of his own covenant, though he may be by the outstanding title or incumbrance covenanted against; but that is beside the question in hand. In the instance of a grantee who gives back a purchase-money mortgage or deed of trust, and suffers from his grantor's

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broken covenant, there is no sound reason for the view that the mortgage to his grantor carried back to the latter the right to sue on the covenants in the original deed or cancelled those covenants. We hold plaintiff's deed of trust had no such effect; and hold, also, that he neither estopped himself thereby to sue on the covenants when a substantial breach occurred which damaged him, nor assigned to defendants the right to sue, for they could not sue themselves. As for the covenants running to Allie Gray as defendants' grantee, suffice to say he was not damaged by the breach, as the incumbrance had been cleared off before he acquired title.

Another defense is that defendants' purchase of the property at the foreclosure sale by the trustee in the purchase-money deed of trust given by plaintiff and wife, cut off redress to plaintiff; and this for the reason that plaintiff was in possession of the premises, and had no right to refuse to pay his notes given for the price, simply because of the existence of incumbrances when he purchased. The legal proposition invoked is correct, for were the law otherwise, a vendee might evade payment of the price and perhaps never be disturbed. [Cartwright v. Culver, 74 Mo. 179.] The same rule applies when the breach consists of a prior incumbrance, for it may never be enforced; though the vendee is permitted to clear it if he pleases, and to recover thereupon from his covenantor, the breach being then substantial. But plaintiff had not discharged the prior incumbrances when the trustee's sale occurred, and it is argued not only that he lost his right of action on the covenant by the sale, but also that he was never damaged by the breach, since his estate passed from him, not as a result of the existence of the incumbrances, but in consequence of his own default in not meeting his notes. Plaintiff cites *Resser v. Carney*, supra; *Haynes v. Stevens*, 11 N. H. 28, and *Wilder v. Davenport's Est.*, 5 Atl. (Vt.) 753, as opposed to the doctrine that foreclosure of a purchase-money mortgage or deed of trust will defeat the mortgagor's right of action against his vendor for a broken covenant, and defendants cite *Wade v. Comstock*, 11 Ohio St. 71, that

it will. We will spend no time examining those cases or their supposed contrary rules; for we are sure no court would hold a mortgagor lost his right if the default and sale occurred, as it did, in the case at bar, according to the jury's finding, pursuant to a scheme arranged between the mortgagor and the mortgagee to have the mortgage foreclosed in order to cure a fault in the mortgagor's title for which the mortgagees were liable on their covenant. A default in the performance of some condition of the mortgage was necessary to a valid sale by the trustee; and as Crosby's only default was in not paying the notes secured, it must have been relied upon to authorize the foreclosure sale.

If defendants, immediately following their purchase at the trustee's sale on March 21, 1910, had conveyed the lot to plaintiff as agreed, the perfect title they subsequently acquired by the sheriff's sale on June 11th would have inured to plaintiff under defendants' warranty of title; or if they had conveyed to him, instead of Allie Gray, after the sheriff's sale, their undertaking would have been fulfilled. But defendants contend the title thus acquired passed immediately to plaintiff, despite the deed to Allie Gray, as plaintiff was still in possession and it was through his fault in failing to record his deed that defendants' deed to Allie Gray, when recorded, vested the title in him as against plaintiff (citing Sec. 2871, R. S. 1909, and cases.) Defendants must be presumed, in deference to the verdict, to have agreed that any purchase made by them or their agent at either sale or both, should be for the benefit of plaintiff and a step toward making his title good. Their conveyance to Gray was a violation of this agreement; and moreover, would have taken precedence of and prevailed over plaintiff's title had his deed been of record, unless Gray had notice of the arrangement between plaintiff and defendants, and the contrary theory ran through the trial. This is true because, as against Gray, plaintiff's title would have been cut off by the trustee's sale. By conveying to Gray, defendants made it impossible for plaintiff to obtain the good title covenanted to him, and left him

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no relief for the purchase money he had paid after Gray had evicted him, except an action on the covenants in defendants' deed to him.

The replication is said to be a new cause of action—a departure from the petition, which should have been stricken out on a motion filed to have that done. The defense set up in the answer is that plaintiff lost his right to sue on the covenants as the result of the trustee's sale. The reply stated the agreement between the parties to have the sale take place as a way to perfect plaintiff's title, seeking no relief on the agreement as another and distinct cause of action, but instead, pleading it in confession and avoidance of the defense set up in the answer, that plaintiff had lost his right to sue on the covenants as the result of the trustee's sale; a proper procedure unless the agreement was a contract which was substituted for the covenants. [Auchincloss v. Frank, 17 Mo. App. 41; Chemical Co. v. Lackawana Line, 70 Mo. App. 274.] If the agreement stands in the way of plaintiff's maintaining an action on the covenants in defendants' deed, it is because if it was made and not kept by defendants, plaintiff was confined for redress to an action on the later agreement and could no longer look to the covenants. The agreement and the covenants appear to be entirely consistent, and this being true, the latter were not superseded, as the contract between the parties, by the former. [3 Page, Contracts, sec. 1340, p. 598; Rhoades v. Railway, 49 W. Va. 494.] The plan was devised, not to take the place of the covenants, but to make them good, and by clearing up the title, prevent any cause of action from accruing on them.

Perhaps an irregularity occurred in summoning five talesmen for the jury panel, but if so, the case ought not to turn on that ruling, it being clear no prejudice to defendants resulted. The very point has been ruled. [State v. Sansone, 116 Mo. 1, 9.]

The court erred in instructing the jury, if they found the issues for plaintiff, to allow him interest on the payments he had made on the purchase price from the date of payment. He was entitled to interest only

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from the date he was evicted, as he had been meanwhile in possession and enjoyment of the property and it does not appear plaintiff was answerable over to any one for the rents and profits. [Hutchins v. Roundtree, 77 Mo. 500.] The true interest to be recovered by plaintiff may be computed from the date of eviction, and if plaintiff will remit the excess, the order sustaining the motion for a new trial should be set aside, the verdict reinstated, the *remittitur* entered, and judgment rendered for the right amount.

The cause is remanded to the circuit court with directions to proceed accordingly; the costs of the appeal should be taxed against the respondents. All concur.

HAYTI DEVELOPMENT COMPANY, Appellant, v.  
W. W. CLAYTON et al.

Division One, March 2, 1920.

1. **QUIETING TITLE:** Under Old Section 650: Effect of Judgment. Section 650, Revised Statutes 1899, contained no authority for a judgment affecting the title of persons not parties or privies. It did not authorize a judgment transferring the title of defendants to plaintiff; all that a decree in a suit under it could do, if properly brought, was to debar and estop the defendants, whether unknown heirs or devisees of a supposed record owner, and those in privity and claiming under them by subsequent deed or right, from setting up, as against the plaintiff and those claiming under her, the title in judgment in that suit. And especially is that the effect of such judgment, if the petition did not pray that defendants' title be transferred to plaintiff. All such a suit, under that statute, could decide was that the defendants had no title and that plaintiff had full title; the judgment did not vest in plaintiff a record title of the ancestor of the unknown heirs.
2. **ADVERSE POSSESSION: Conflict in Testimony.** Where plaintiff in the suit to quiet title and ejectment had no record title, and the evidence as to whether it used the property in connection with other property possessed by it to create title by adverse possession was in dispute, the finding of the trial court settles the question on appeal.
3. —: **Laches.** The defense of laches is only applied to defeat a claim for equitable relief. Laches is not a bar to a claim made under a legal title.

Appeal from Pemiscot Circuit Court.—Hon. Sterling  
H. McCarty, Judge.

AFFIRMED.



*Everett Reeves and Gallivan & Finch* for appellant.

(1) Where a common source of title is established by agreement or proof, plaintiff need not go back of such common source in making his case. *Harrison Machine Works v. Bowers*, 200 Mo. 235; *Brown v. Brown*, 45 Mo. 412; *Fellows v. Wise*, 49 Mo. 350; *Butcher v. Rogers*, 60 Mo. 138; *Miller v. Hardin*, 64 Mo. 545; *Smith v. Lindsey*, 89 Mo. 76; *Finch v. Ullman*, 105 Mo. 263; *Worley v. Hicks*, 161 Mo. 384; *Charles v. White*, 214 Mo. 211; *Grattan v. Holliday-Klotz L. & L. Co.*, 189 Mo. 322. (2) The defense of laches and estoppel is only applied to defeat a claim for equitable relief. It is no bar to a claim made under a legal title. *Kellogg v. Moore*, 271 Mo. 189; *Dunavant v. Cooperage Co.*, 188 Mo. App. 94; *Haarstick v. Gabriel*, 200 Mo. 249; *Terry v. Groves*, 258 Mo. 478; *Lumber Co. v. McCable*, 220 Mo. 182; *Hayes v. Scholl*, 229 Mo. 124; *Chilton v. Nichie*, 261 Mo. 243. (3) Plaintiff is not estopped by the acts or conduct of Laura Oates after the date of the deed of trust under which plaintiff claims title. *McShane v. City of Moberly*, 79 Mo. 41; *Snyder v. Chicago, Sante Fe & Cal. Ry. Co.*, 112 Mo. 527; *Zoll v. Carnahan*, 83 Mo. 43; 16 Cyc. 779-80. (4) The defendants' grantor, having entered into possession of the premises in question, under plaintiff's grantor, cannot claim possession adverse to plaintiff, until some notorious and unequivocal act of exclusion occurred to give notice of an adverse claim. 1 Cyc. 1062; *Lumber Co. v. Craig*, 248 333; *Realty Co. v. Realty Co.*, 245 Mo. 436; *McCune v. Goodwillie*, 204 Mo. 339. (5) Possession of a part of the east half of the southwest quarter of Section 33, Township 19, Range 12, under color of title to the whole tract and exercising the usual acts of ownership over the same, was possession of the whole. Sec. 1882, R. for more than ten years by plaintiff, and those under whom it claims, vested the legal title to the whole tract in plaintiff. *Truitt v. Bender*, 193 S. W. 838; *Nall v. Conover*, 223 Mo. 477; *Plaster v. Grabeil*, 160 Mo. 669; *Crispen v. Hannavan*, 50 Mo. 536; *Pharis v. Jones*, 122 Mo. 125.

*R. L. Ward* for respondent.

(1) Under Sec. 2535, R. S. 1909, to quiet title, it is the duty of the trial court to enter a judgment on behalf of the party showing the better title; and a title where one party is in the actual, honest possession, especially if that party is the defendant, should be quieted as between plaintiff and defendant, in defendant. *Dowd v. Bond*, 199 S. W. 956. (2) Plaintiff must make a prima-facie case showing the title in itself before it can become entitled to a decree declaring defendant's claim invalid. *Heagy v. Miller*, 187 S. W. 890; *Senter v. Lumber Co.*, 255 Mo. 602; *Orchard v. Mining Co.* 184 S. W. 1138; *Skillman v. Clardy*, 256 Mo. 297; *Wheeler v. Reynolds Land Co.*, 193 Mo. 279. (3) Plaintiff not showing ten years actual possession of the 80 acre tract of land which this forty is a part; its failing to show the "usual acts of ownership" of this forty acres in question; and failing to show this forty was used in connection with the forty acres in possession as one farm or one tract, fails to prove title by limitation. Sec. 1882, R. S. 1909; *Stone v. Perkins*, 217 Mo. 586; *Morgan v. Potts*, 124 Mo. App. 379; *Nall v. Conover*, 223 Mo. 495. (4) Plaintiff having neither title by possession nor paper title, is driven to try to connect title by a decree determining title between *Laura Oates* and the unknown heirs of *Tobias Bentley*. But "a judgment, under Sec. 2535, R. S. 1909, quieting title does not have the effect of transferring to plaintiff, the title which the defendant therein previously held." *Dunavant v. Pemiscot Land & Co.*, 188 Mo. App. 90; *Powell v. Crowe*, 204 Mo. 481; *Weed Sewing Machine Co. v. Baker*, 40 Fed. 56; 33 Cyc. 1384. (5) A party sought to be concluded by a former judgment must have been a party to both suits or actions. *Dibert v. D'Arcy*, 248 Mo. 617; *Grimes v. Miller*, 221 Mo. 636; *Woods v. Smith*, 193 Mo. 484; *Pierce v. Pierce*, 139 Mo. App. 419; *Ives v. Kimlin*, 140 Mo. App. 293; *Abington v. Townsend*, 271 Mo. 610.

BLAIR, P. J.—The petition contains two counts; one under Section 2535, Revised Statutes 1909, to quiet title, and one in ejectment. The land involved is the northeast quarter of the southwest quarter of Section 33, Township 19, Range 12, in Pemiscot County. The answer admits that respondents claim to own the land; avers they are and have been in possession at all times mentioned in the petition; avers appellant has no title, but that respondents own the land in fee simple, and prays that the title be ascertained and determined. A second count sets up the ten-year Statute of Limitation, and a third count pleads laches and estoppel and prays a decree of title in respondents and for general relief. The court found the issues for respondents, and adjudged that appellant had no title or interest in the land, and that respondents are the owners in fee thereof. This appeal was taken from that judgment. Other facts necessary to a determination of the case appear in connection with the discussion of the questions to which they are relevant.

I. Appellant attempted to show record title in itself. To this end it offered evidence which it contends proves that Tobias P. Bentley secured the record title November 17, 1857, by means of a warranty deed to him from John S. Wheeler and wife. Appellant claims, through mesne conveyances, under a trustee's deed under sale under a trust deed executed by Laura M. Oates, May 15, 1907. So far as concerns the question now being discussed, the record title of Laura M. Oates, and, therefore, the record title of appellant, depends upon a decree in a suit to quiet title which Laura M. Oates instituted April 6, 1907, against the unknown heirs and devisees of Tobias P. Bentley. The allegations of the petition in that suit brought it within Section 650, Revised Statutes 1899, as it then stood. That section authorized suits "to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of

**Decree Under  
Section 650.**

the parties severally in and to such real property." The prayer of the petition in that case was that "the court will ascertain and determine the estate, title and interest of this plaintiff and said unknown defendants in and to said real estate, and that the court will define and adjudge and decree that plaintiff is the owner of said real estate in fee simple, absolute, and that said defendants, nor none of them, have no right, title, claim or interest in or to the same or any part thereof, and for such other," etc. The order of publication, whereby service was had upon the unknown heirs and devisees of Tobias P. Bentley, was peculiar. It notified them that the "object and general nature" of the suit was "to enforce and establish a lawful right, claim and demand to and against certain real estate, property within the jurisdiction of said court, to-wit, an action to try, ascertain and determine the respective parties plaintiff and defendants herein and to the following described," etc. Respondents in this case do not claim under the heirs and devisees of Bentley, nor under Laura M. Oates. The judgment in *Oates v. The Unknown Heirs and Devisees of Tobias P. Bentley* did not transfer the Bentley title to Laura M. Oates. It could not do so. The statute (Sec. 650, R. S. 1899), authorized no such relief; the petition prayed for no such relief, and the notice of publication did not advise defendants that a decree, having any such effect was being sought. That decree, if otherwise valid, debarred and estopped the unknown heirs and devisees of Bentley and those in privity and claiming under them by subsequent deed or right, from setting up, as against Laura M. Oates and those claiming under her, the title in judgment in that suit. It did not and could not affect the right of one neither party nor privy. There were no special equities authorizing either an order for a conveyance or a decree revesting title, or the like. It was a plain suit under the then statute, not to secure the Bentley title, but to secure a decree that the Bentleys had no title and that Laura M. Oates already had full title. In *Lockwood v. Meade*, 71 Kan. l. c. 741, answering a like contention, the

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court said: "But an ordinary decree quieting title against a defendant does not add his claim to that already possessed by the plaintiff. It effects no affirmative increase in the plaintiff's right. It strengthens his title only in that it cuts off a source of attack. It brings to him no new and independent right which he may assert against a stranger to the suit. It adjudges that the defendant has no claim to the property—not that a claim which he has must be deemed to be transferred to the plaintiff. [Weed Sewing-machine Co. v. Baker, 40 Fed. 56; Harrigan v. Mowry, 84 Cal. 456.]" Other decisions are to the same effect. [Dunavant v. Cooperage Co., 188 Mo. App. 1. c. 90, citing 32 Cyc. 1384; Vandergrift v. Shortridge, 181 Ala. 1. c. 278; Elwert v. Reid, 70 Ore. 318.] Particularly is this true of a suit to quiet title under Section 650, Revised Statutes, 1899, since "there is no authority in that section for the court to do more than to ascertain and determine, define and adjudge the title, interest and estate of the parties severally in and to such real estate." [Powell v. Crow, 204 Mo. 1. c. 486.] It has been held (Wheeler v. Ballard, 91 Kan. 1. c. 361) that as between the parties the difference between a decree destroying a defendant's title for plaintiff's benefit and one transferring defendant's title to plaintiff is of no considerable importance; but the court was careful to point out, citing the Lockwood-Meade case, that it spoke only of a case in which "other parties are not involved." In this case respondents come within the term "other parties" as used in that decision. Therefore, though it be conceded Bentley had the record title from Wheeler, appellant is not, on this phase of the case, aided thereby, since it has proved conclusively it has not secured the Bentley title; has shown it has no record title; and it makes no other claim of record title as we read the brief.

II. Appellant claims title by adverse possession. It offered in evidence certain deeds which it relied upon as a chain constituting color of title. The first of these is dated in 1883. This is a sheriff's deed to Schult.

Next, a deed from Schult and wife to E. G. Rankin, dated January 1, 1884; deed from Rankin to T. P. Robinson, dated April 8, 1884; deed from T. P. Robinson to Schult, April 17, 1885; deed from Schult and wife to William Tarkington, dated November 3, 1897, and a deed from William Tarkington to Laura M. Oates, dated October 23, 1905. Respondents and their grantors have been in possession since the fall of 1907. This suit was brought in 1914.

(a) As already pointed out, the Bentley decree, relied upon also in this connection, does not affect respondents. They were not parties, do not claim under any of the parties, and their interest was not in litigation or affected in any way.

(b) The oral evidence was undeniably conflicting upon the question of adverse possession of appellant's grantors. It is indisputable that appellant's grantors never had actual adverse possession of the requisite character of the land in suit for any ten-year period. Whether they used the property in such connection with other property of which they may have had such possession was in dispute. In such circumstances the finding of the trial court for respondents settles that question against appellant.

III. It is argued respondents went into possession in 1907 under Laura M. Oates. Appellant's evidence tends to show one George was the tenant of Laura M. Oates and sold out to Clayton. It is claimed Clayton thereby became the tenant of Oates and his possession was and is, therefore, not adverse. Respondents' evidence tended to disprove the contention of appellant. The finding of the court settled the conflict against appellant, and binds us.

IV. We agree with the appellant that the defense of laches was not available to respondents in this case (*Chilton v. Nickey*, 261 Mo. l. c. 243) and that appellant

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was not called upon to go back to the common source of **Laches**. title. In view of the general finding of the court, and the absence of instructions asked or given, the questions already discussed dispose of the case and render unimportant the matters just mentioned. There is a correct legal theory, supported by substantial evidence, which justifies the finding against appellant's claim of title. No question concerning the admission or rejection of evidence or other procedural errors are urged in this court.

This disposes of all the questions presented by the brief. The judgment is affirmed. All concur.

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J. B. SIMPSON, Appellant, v. HARRY J. STEWART  
et al.

Division One, March 2, 1920.

1. **LOST CORNERS: Conflict Between Statute and Land Office Rule.** If the statute pertaining to the re-establishment of decayed corners of surveyed lands (Sec. 11322, R. S. 1909) operated to change the boundaries of United States surveys, so that one who purchased land according to those surveys would be divested of a portion of it, and another who did not purchase such portion would be invested with it, the statute, in so far as it conflicts with the rules of the General Land Office pertaining to the re-establishment of lost corners, would be void; but the statute can have no application where the original boundaries are known or can be ascertained, for before it can be invoked it must appear that the corner is not merely obliterated, but is *lost*—that is, that its *locus* cannot be determined either from the plat and field notes of the original survey, or by any competent extrinsic evidence.
2. ———: ———: **Statute Paramount.** The rule of the General Land Office is controlling in every instance in which it is sought to re-establish a lost internal section corner on the public lands of the United States; but as to lands within the State whose titles have passed to private owners and the jurisdiction of the U. S. Government in reference thereto has ceased, the statute is, in a sense, a rule of evidence, and, in cases in which it is applicable, is obligatory upon the courts.

Appeal from New Madrid Circuit Court.—*Hon. Sterling H. McCarty*, Judge.

AFFIRMED.

*Gallivan & Finch* for appellant.

(1) The surveying, and sectionizing of the public lands was under Government supervision and control and any State law which would change the corner or produce a different result is inoperative and void. *Knight v. Elliott*, 57 Mo. 326; *Frazier v. Bryant*, 59 Mo. 124; *Lemmon v. Hartsock*, 80 Mo. 18. (2) Sec. 11322, R. S. 1909, will not establish a lost corner at the place originally established and will produce a different result and is therefore inoperative. Rule 56, General Land Office; Cases supra; *Major v. Watson*, 73 Mo. 664. (3) Where there is no substantial evidence of the location of a lost corner it is a lost or destroyed corner. (4) The court having ignored both the state statute and the rules of the General Land Office the finding cannot stand.

*Riley & Riley* for respondent.

(1) Section 11322 is not in conflict with the laws of the United States or the rules of the Land Office on the subject of lost section corners. *Frazier v. Bryant*, 59 Mo. 132; *Clark v. McAtee*, 227 Mo. 185. (2) The proof in this case shows that the lost corner was found and that it was at the point on the line running south from the northwest corner of Section 27, which places the corner at the places where the witnesses Steel and Robbins say it is.

RAGLAND, C.—This is an action at law, to quiet title and in ejectment. Both counts of the petition are conventional. The land is described as a strip off of the



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west side of Section Thirty-four, Township Twenty-four, Range Thirteen, New Madrid County, Missouri, in the shape of a triangle about eighty rods wide at the north end and running to a point at the south end of said section. The answer is a general denial. The controversy grows out of a dispute as to the location of the boundary line between Sections Thirty-four and Thirty-three, Township Twenty-four, Range Thirteen. The plaintiff owns Section Thirty-four and the defendant Section Thirty-three. If the boundary is where plaintiff claims that it is, the land in controversy is in Section Thirty-four and consequently belongs to him; otherwise, it is in Section Thirty-three and belongs to defendants. The uncertainty existing as to the location of the line that forms the east boundary of the one and the west boundary of the other of these sections, results from the inability of the parties to find the Government corner between the north ends. No visible evidence remains of the work of the original surveyor in establishing it, nor has its *situs* been preserved by subsequent surveys or otherwise. It cannot be located from the field notes, nor by extrinsic evidence. While there was some evidence offered by the defendants touching the identification of a certain elm tree as one of the witness trees referred to in the field notes, it was of such a vague and inconclusive character as not to amount to proof. So that plaintiff insists, and defendants in effect concede, that the corner is not merely obliterated, but is lost and must be re-established.

Rule 56 of the Rules of the General Land Office of the United States, revision of June 1, 1909, relating to the re-establishment of lost corners, provides: "When a number of corners are missing on all sides of the one sought to be re-established, the entire distance must, of course, be remeasured between the nearest existing recognized corners, both north and south, and east and west, in accordance with the rule laid down, and the new corner re-established by proportionate measurement." Section 11322, Revised Statutes, 1909, contains, among others,

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this provision: "When several adjacent corners are decayed, it shall be legal to commence at any two of the nearest township, section or quarter-section corners to the corner sought, and in transverse directions therefrom, and run in the direction thereof, on the general course of lines in the township in which the survey is to be made, until the lines intersect, always, however, taking into consideration the fallings of the east and west lines, which point of intersection shall be the legal corner." The nearest known corners to the missing corner in question are the northeast corner of Section Thirty-four and the quarter section corner between sections Thirty and Thirty-one, on the east and west line, and the northwest corner of Section Twenty-seven and the southwest corner of Section Thirty-four, on the north and south line. At the instance of plaintiff, Murray and Wade Kochtitzky, two practical surveyors, following the rule prescribed by the General Land Office, located the lost corner at a point 82.27½ chains north of the southwest corner of Section Thirty-four and 78.83 chains east of the northeast corner of said section. They both testified that, had they followed the statutory rule they would have located the corner about five chains east of the point at which they did place it. Otto Kochtitzky, a civil engineer and surveyor, testifying for plaintiff somewhat in the character of an expert as to the proper method of relocating lost corners, stated in effect that if the statutory rule were followed the missing corner would be placed about five chains east of where Murray located it. Steele, the county surveyor of New Madrid County, and Robbins, a practical surveyor, at the request of defendants, following methods of their own, which did not conform to either the statute or the rule of the Land Office, located the corner 4 chains and 60 links east of where Murray located it. Robbins testified that, if the method adopted by Murray was the proper one, the corner should be re-established at the point the latter fixed. Steele tacitly agreed to the same thing. The triangular piece of land, lying between the lines drawn from Mur-

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ray's corner and Steele's corner, respectively, to the southwest corner of Section Thirty-four, is the land in dispute. The defendants are in possession.

The case was tried to the court. The finding and judgment were for defendants and plaintiff appeals.

At the request of the parties the court gave a number of declarations of law, and it is the giving of those asked by defendants of which appellant predicates error. The facts for all practical purposes stand conceded, viz: Murray correctly re-established the corner according to the Land Office rule; Steele's relocation is the one that would have resulted from the application of the statutory rule. The question that is decisive of the case and of this appeal is, which rule on these facts is controlling? It would be futile, therefore, to take up in detail for consideration the correctness of the court's rulings in respect to the declarations of law. The record as a whole clearly presents the one controlling question of law in the case.

I. It is appellant's contention that the statute in question, in so far as it conflicts with the rules of the General Land Office is void. If the statutes operated to change the boundaries of United States surveys, so that one man who purchased land according to Government survey would be thereby divested of a portion of it, and another who did not purchase such portion would be invested with it, the contention would be sound. [Knight v. Elliott, 57 Mo. 317, 326; Lemmon v. Hartsook, 80 Mo. 13, 19.] But the statute can have no application where the original boundaries are known or can be ascertained. Before it can be invoked, it must appear that a corner is not merely obliterated, but *lost*, that is, that its *locus* cannot be determined either from the plat and field notes of the original survey, or by any competent extrinsic evidence. The rule of the Land Office under consideration is likewise applicable only in the case of a lost corner. The method it prescribes is not the method employed by the surveyor in

**Statute and  
Land Office  
Rule.**

originally establishing such a corner; it is not merely such a retracing of his steps as would indubitably lead to the *locus* sought. There is not the slightest ground for asserting that the rule, any more than the statute, will determine the exact point at which a missing corner was originally located. Both were adopted as a means of re-establishing *lost internal* section corners, and, while the original *situs* can be ascertained by neither, an approximation thereof according to the general course of the lines of the township can be made by the more or less arbitrary rule prescribed by each, though the results reached by the several applications of the two rules would not in all cases be the same. That the rule of the General Land Office is controlling in every instance where it is sought to re-establish a lost internal section corner on the public lands of the United States is beyond question. But as to lands in this State, the titles to which have passed to private owners and the jurisdiction of the General Government in respect to the surveys thereof has ceased, the rule can be regarded as advisory only. The statute on the contrary is, in a sense, a rule of evidence prescribed by the Legislature and, in cases in which it is applicable, it is obligatory upon the courts to give it effect. It may be that the rule of the Land Office is more equitable, in that, it tends to more ratably apportion the land among the sections affected where the original boundaries cannot be ascertained, but, if so, it is a matter that addresses itself exclusively to the wisdom of the Legislature.

II. While the judgment of the trial court is in accord with the views herein expressed, it is somewhat ambiguous. As it in effect establishes the north section corner between Sections Thirty-three and Thirty-four, the finding therein recited should more specifically conform to the conceded facts in proof, to the end that confusion and further dissention may, if possible, be avoided. The judgment will according be modified by striking out the words "described therein is a part

Judgment.

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of Section Thirty-three, Township Twenty-four north, of Range Thirteen east, in New Madrid County, Missouri," in the first paragraph thereof, where they occur between the words "land" and "and that," and inserting in lieu thereof the following: "in controversy herein is not in Section Thirty-four as alleged in the petition, but is a strip off of the east side of Section Thirty-three, Township Twenty-four, Range Thirteen, in New Madrid County, Missouri, in the form of a triangle, being 4 chains and 60 links wide at the north end and running to a point at the south end of said section," and by striking out the word "therein," where the same occurs in the fourth paragraph between the words "land" and "described," and inserting in lieu thereof the word "hereinbefore." As so modified the judgment is affirmed. *Brown* and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

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HENRY C. KORNEMAN, Appellant, v. JOHN E. G. DAVIS et al.

Division One, March 2, 1920.

1. **CONVEYANCE: Latent Ambiguity: Admissibility of Acts of Parties.** When there is a latent ambiguity in the description of land as contained in the deed, the circumstances and situation of the parties and the construction they have put upon the deed by their acts, are admissible in evidence; but when the language of the deed contains no ambiguity, or when such language, applied to the subject-matter and circumstances, leaves no substantial doubt as to the property conveyed, then the acts of the parties under the deed are inadmissible.
2. ———: ———: **Quantity.** An estimate of the land conveyed by a deed as "about thirty acres" is a part of the description, and may be used to ascertain the particular thing conveyed.

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3. ———: ———: **Beneficent Acts of Grantor.** Where a father conveyed thirty acres of land lying south of a creek, as a gift to a daughter, reserving a life estate to himself, the taking possession by the daughter of an adjoining four-acre tract lying east of the creek and his acquiescence therein, a gift of a small amount of money arising from the sale of logs therefrom and a failure of the father to object to her taking timber therefrom to build an ice-house, are to be regarded as other acts of kindness towards the daughter without regard to his or her legal rights, and not as an interpretation by conduct of the description of the land contained in the deed, and are not admissible to show that the four-acre tract was conveyed.
4. **PRACTICE: Finding of Facts.** A statutory finding of facts should embrace all the material facts bearing on the issues involved, and should set them out in detail, and not merely state conclusions and inferences therefrom.

Appeal from Clinton Circuit Court.—*Hon. Alonzo D. Burnes*, Judge.

REVERSED AND REMANDED.

*W. S. Herndon, J. M. Johnson and Henri L. Warren*  
for appellant.

(1) The solution of this controversy turns upon the construction of the deeds from Thomas P. Jones to his daughter and the subsequent deed in partition from the sheriff to plaintiff. In construing the first mentioned deed, the primary task is to ascertain the true intention of the grantor, and unless there be found some ambiguity or uncertainty with respect to the description of the land conveyed, resort cannot be had to parol evidence of statements and acts of the grantor to ascertain such intention. 2. Devlin on Real Estate (3 Ed.), p. 2025; Long v. Timms, 107 Mo. 512; Weissenfels v. Cobel, 208 Mo. 515; 9 C. J. 158; 17 Cyc. 618; Long v. Wagoner, 47 Mo. 178; Heady v. Hollman, 251 Mo. 633; Warne v. Sorge, 258 Mo. 165; 18 C. J. 262; Elsea v. Smith, 273 Mo. 396; Eckle v. Ryland, 256 Mo. 440; Howell v. Sherwood, 242 Mo. 536; O'Brien v. Ash, 169 Mo. 283. (2) Where the description of the land in the deed when considered in the light of

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the physical conditions of the subject-matter as referred to therein is open to two constructions—one clear, definite and certain, and the other ambiguous, indefinite and uncertain—the clear and definite meaning will be taken as expressive of the real intention of the grantor. 9 C. J. 152, 208 and note 77; Hubbard v. Whitehead, 221 Mo. 672; 1 Greenleaf on Evidence (16 Ed.), sec. 605 L; 18 C. J. 217. (3) Shoal Creek is a natural monument. It completely traversed the sixty-acre tract of the grantor. (4) Another rule of construction of a deed is a call for quantity. When others calls in a deed will not aid the court, then a call for quantity will be used to ascertain the true intention of the grantor before parol evidence of his intention can be resorted to. Davis v. Hess, 103 Mo. 31; 9 C. J. 171, sec. 30; 9 C. J. 163, sec. 44 at p. 176, p. 228; Behert v. Myers, 240 Mo. 58; Cole v. Mueller, 187 Mo. 638. (5) Considering the relationship of father and daughter, which existed between the grantor and grantee, the fact, if it be a fact, that the father allowed the daughter to take timber from the disputed tract for certain specific purposes would not constitute evidence of ownership or claim of ownership to the disputed tract or of an intention to include it in the grant to his daughter. 18 C. J. 261; Miller v. Miller, 91 Kan. 1; Davis v. Hardin, 1 Ky. L. 165; Hubbard v. Hubbard, 140 Mo. 305.

*Wm. Henry and Frost & Frost* for respondent.

(1) If there is any doubt as to the meaning or application of the term "south of Shoal creek" as employed in the deeds, the meaning and application given by the parties who used them should prevail. Fetley v. McMurry, 201 Mo. 393; St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121; Rose v. Corborating Co., 60 Mo. App. 32; Richardson v. C. & A. Ry. Co., 62 Mo. App. 5; Bernero v. Real Estate Co., 134 Mo. App. 299. Dobbins v. Edmonds, 18 Mo. App. 315; Morey v. Feltz, 187 Mo. App. 663; Laclede Const. Co. v. Moss Tie Co., 185 Mo. 67;

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Pub. Co. v. McNichols, 170 Mo. 735. (2) Where all the parties have acted on a particular meaning of an agreement or contract there is no better mode of ascertaining the true meaning than by their acts. Union Depot Co. v. Ry. Co., 131 Mo. 305. (3) The suit for the partition of the lands of Thomas P. Jones and the proceedings and sale therein, did not have the effect to convey any title other than that which remained in his heirs after his death. Powell v. Powell, 267 Mo. 125; Jelley v. Lamar, 242 Mo. 50; Whitsett v. Whitsett, 159 Mo. 25; Propes v. Propes, 171 Mo. 416.

SMALL, C.—Appeal from the Clinton County Circuit Court. Suit in ejectment for four and a fraction acres of land. Judgment for defendants. Plaintiff appeals. Plaintiff claims title by sheriff's deed under decree in partition of certain lands in said county belonging to the widow and heirs of Thomas Jones, deceased. He died on the 9th of December, 1915, intestate, leaving surviving him, his widow, Nancy T. Jones, his four sons, William M., James L., Charles G. and Harrison Jones, and two daughters, Susan B. Kennedy and Zelleeta Heflin. On March 12, 1914, in consideration of one dollar and love and affection, said Thomas Jones executed a warranty deed conveying to his daughter Susan B. Kennedy land in said deed described, as follows:

"The following described lots, tracts or parcels of land, lying, being and situate in the County of Clinton and State of Missouri, to-wit: That part of the east half of the south east quarter of Section Eleven, Township Fifty-six, of Range Thirty, lying south of Shoal Creek, containing about thirty acres.

"*Recital*, The grantors herein reserving unto themselves or the successors thereof a life estate in the lands hereby granted, and it is further provided that this conveyance is made on the express condition that if the grantee herein attempts to alien, sell or convey the lands granted or place any lien thereon during the life of the grantors herein, or either of them, without their written



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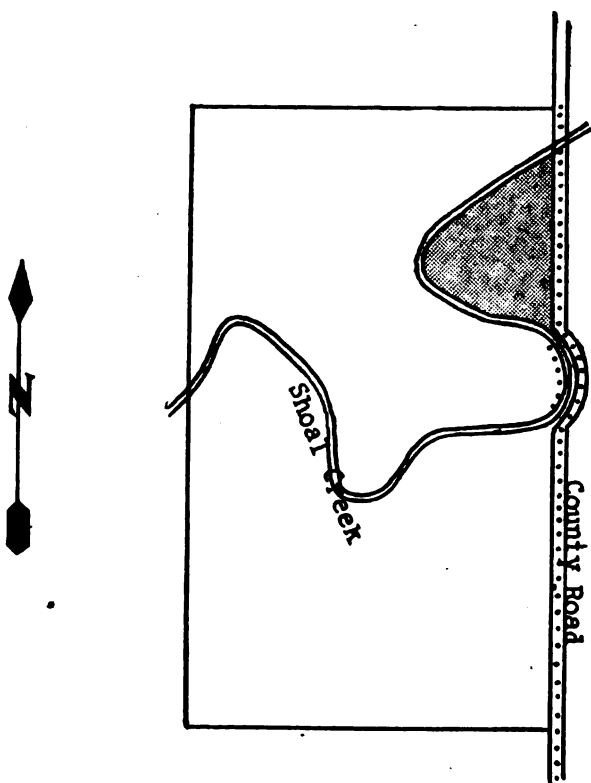
consent duly acknowledged before a notary public the lands herein shall revert to and the title shall unconditionally vest in the grantors, their heirs and assigns."

At the time this deed was executed, said Thomas Jones owned the south three-fourths of the said east half of the southeast quarter of said Section Eleven. The judgment in partition was rendered at the April Term, 1917, of the said court. The property was sold at sheriff's sale in partition September 24, 1917. The tract purchased by plaintiff in his sheriff's deed is described as follows:

"All that part of the south three-fourths of the east half of the southeast quarter of Section Eleven, in Township Fifty-six of Range Thirty lying north of Shoal Creek, and containing thirty acres more or less."

The sheriff's deed was dated and duly acknowledged in open court on October 2, 1917. Upon receiving his deed, the plaintiff proceeded to erect a fence on the south and east sides of the land, inclosing the tract in controversy, when defendant Davis appeared and tore the fence down. He was accompanied by the "silent sentinel of the 'fire-side'"—the family shotgun—and suggested the propriety of "blowing a hole" through one of plaintiff's boys, so the boy testifies, "big enough to crawl through."

A plat of said south three-fourths of said half-quarter section, made by a surveyor, witness for plaintiff, was introduced in evidence, of which the following is a copy so far as it shows the location and course of Shoal Creek in and through the said tract:



The land in controversy is the shaded part in the bend of Shoal Creek in the north half of the tract. The plaintiff claims that he obtained title to it by virtue of his sheriff's deed under the sale in partition, and the defendants claim title to it by virtue of a deed from Susan B. Kennedy and husband, dated October 23, 1917.

Plaintiff's surveyors further testified that the part of the tract shown on the plat south of the creek, where it runs irregularly through the tract from west to east, contained 29 acres and 97 rods and the part north of said creek, including the part in controversy, contained 27 acres and 108 rods. That the tract in controversy contained 4 acres and 133 rods.

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There was evidence pro and con to the effect that before the sale in partition took place an announcement was made to all bidders that Mrs. Kennedy owned the tract in controversy, but the sheriff, never-the-less, offered and sold the land to plaintiff, as described in his sheriff's deed.

The partition proceedings to which all the Jones heirs, including Mrs. Kennedy, were parties, included several different tracts, and the judgment therein, after reciting them all, stated they contained "264 acres more or less." Giving the other tracts the acreage they were entitled to, as regular Government subdivisions, the plaintiff's tract must in said judgment have been estimated as containing "30 acres more or less," as stated in the deed of the sheriff to the plaintiff.

There was evidence that Harrison Jones, one of the sons, was in possession of the whole 60-acre tract under some sort of a verbal arrangement with his father, when the deed to Mrs. Kennedy was made, and that he refused to give up possession until sometime in December 1914, when his father paid him \$100 — he says, to pay for some clearing he had done, and other witnesses say, to surrender possession to his sister, Mrs. Kennedy. There is evidence that Mrs. Kennedy then made a verbal lease to her brother Charles of all of her property, intending to include the property in question therein, and that he afterwards made a verbal lease thereof to the defendant Davis. There also arose a controversy as to payment for some walnut logs, and there is testimony that the father paid Mrs. Kennedy \$33.33 for logs cut from the property in question. Charles Jones and others testify to this. But, according to Harrison Jones, this money was paid her for logs cut on her land further south, about which there is no dispute. After December, 1914, and during the father's life, some timber was cut from the land in question to make lumber for an ice house, which Mrs. Kennedy built on another tract of ground. Also other timber cut off by her. There was no fence around the ground conveyed to Mrs. Kennedy to separate it

from the reminder of the tract. Charles Jones had charge of the rest of the tract for his father, and there was evidence introduced by defendants, that wood was cut from the land west of the tract in question, admittedly owned by the father and stored and piled on the land in controversy after the deed to Mrs. Kennedy. That the controversy between the Jones brothers at sometime during this period was also somewhat calorific is shown by the suggestion of one of the witnesses that on one occasion said "silent sentinel," though not actually present, was referred to with approval by said Harrison Jones.

At the close of the testimony, the court made the following finding of facts:

"The court makes the following finding of facts as requested by the attorney for the plaintiff at the beginning of the trial. After hearing all evidence, the court finds from the weight of the evidence, that Thomas P. Jones and wife conveyed the land in question to their daughter Mrs. Kennedy, and after the sale to Mrs. Kennedy that Mrs. Kennedy exercised acts of ownership over the land, and by her acts the said Thomas P. Jones knew that she was claiming it as her own and acquiesced therein.

"And the court further finds that said Mrs. Kennedy sold said land to Mr. Davis, who used it and had possession and control of it as his own up to the time that his possession was interfered with by the plaintiff in this case, and that the defendant still has the open and actual possession of said land and did have at the commencement of this suit, and that the defendants have the legal title to said land and are entitled to the possession thereof."

To which finding of facts the plaintiff excepted.

The court refused the following declarations of law asked by the plaintiff:

"6. The court, sitting as a jury, declares the law to be that if the court finds from the evidence that Shoal Creek entered the west side of the east half of the south-

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east quarter of Section 11, Township 56, Range 30, in Clinton County, Missouri, and flowed across said half-quarter section, emerging therefrom on the east side thereof, passing beyond the east line thereof, then the deed from Thomas P. Jones to Susan B. Kennedy, offered in evidence, only conveyed that part of said half-quarter section lying south of the point where said Shoal Creek entered on the west line and the point where said creek passed through and beyond the east line of said half-quarter section, notwithstanding the fact said creek, after passing beyond the east line of said half-quarter section, again entered the same and flowed around the tract in controversy before again passing beyond the east line of said half-quarter section.

"7. The court, sitting as a jury, declares the law to be that all statements or acts of Thomas P. Jones, deceased, and all acts of the defendant's grantor, with reference to the land in controversy, as testified to by the witnesses for the defendant, are not competent evidence in this case and are not to be considered in making and finding on the issues in the case."

Plaintiff duly excepted to the court's refusal to give said declarations.

Failing to obtain a new trial, the plaintiff appealed to this court.

I. It is true that when there is a latent ambiguity in a description of land, the circumstances and situation of the parties, and the construction they have put upon the deed by their acts, are admissible in evidence. [Tetley v. McElmurry, 201 Mo. 382; Gas Co. v. St. Louis, 46 Mo. 121; Union Depot Co. v. Railroad, 131 Mo. 291.]

But it is also true that when the language of the deed contains no ambiguity, or when such language applied to the subject-matter and circumstances leaves no substantial doubt as to the property conveyed by the deed, then the acts of the parties under the deed are inadmissible. [Gas Co. v. St. Louis, 46 Mo. 121; Weissenfels v.

Cable, 208 Mo. 515; Beheret v. Myers, 240 Mo. l. c. 75.]

In Gas Co. v. St. Louis, 46 Mo. l. c. 131-2, the court said: "The intention of the parties must be *first sought* in the instrument in all its parts, in its scope and purpose, and in the circumstances in which the parties were placed; and before deciding whether we may consider the practical interpretation of the parties, we must see whether the intention is clear and unmistakable." (The italics are ours.)

In Beheret v. Myers, 240 Mo. l. c. 75, quoting from Chief Justice KENT, this court said: "'It is a sound rule of evidence that you cannot alter, or substantially vary the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries: and it cannot be too steadily supported by courts of justice. . . . If the words of a contract be intelligible, says Lord Chancellor THURLOW (Shelburne v. Inchiquin, 1 Bro. C. C. 341), there is no instance where parol testimony has been admitted to give them a different sense.'"

It is also ruled that in construing a deed all the words of the deed within its four corners must be considered together and given effect and that words stating the estimated quantity or area are part of the description of the land and must be so considered in fixing the identity of the tract conveyed. In Davis v. Hess, 103 Mo. l. c. 36, BLACK, J., said: "The rule of law is well settled that the call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain. . . . In deeds as well as in wills and contracts, we are to determine the intention of the parties thereto, and this is done by taking the instrument as a whole." To the same effect is Cole v. Mueller, 187 Mo. l. c. 647, where FOX, J., said that the estimate of the area as a certain number of acres "more or less" is "part of the description." BROWN, C., in Whitwell v. Spiker, 238 Mo. l. c. 641, refers to and follows the rule in Cole v. Mueller, supra, as "a means . . . of ascertaining the particular thing" to which the description in the deed applies.

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In this case, the deed to Mrs. Kennedy conveys all of the tract therein mentioned, "lying south of Shoal Creek, and containing about thirty acres." The testimony of the surveyors for plaintiff was that the area of the land south of Shoal Creek, running irregularly from west to east through the tract, was 29 and a fraction acres, which thus fully identifies that part of said tract as the land conveyed and intended to be conveyed by the Kennedy deed. The four-acre tract in question cannot by any fair use of the English language be said to lie south of Shoal Creek at all, any more than it lies north of that part of Shoal Creek constituting its southwesterly boundary. It could only be described as a tract by itself lying east of Shoal Creek. To include it in the deed of Mrs. Kennedy would make her deed contain two disconnected tracts substantially exceeding the estimated area in her deed. So, too, a strong circumstance is that Shoal Creek running irregularly through said tract, as it does, from west to east, is a natural dividing and boundary line between the two nearly-equal parts of the tract, and leaves each one contiguous body of land. The partition proceedings, too, indicated that the portion north of the creek still belonging to the estate contains 30 acres more or less, which would exclude the tract in controversy from Mrs. Kennedy's deed. The language of Mrs. Kennedy's deed when applied to the subject-matter and potent surrounding circumstances is perfectly clear and without ambiguity. Therefore, parol evidence of the interpretation of the parties by their conduct or otherwise was inadmissible. Besides, the parol evidence admitted in this case does not *necessarily* show that either the grantor, Thomas Jones, or the grantee, Mrs. Kennedy, by their conduct, thought that the tract in question was conveyed to Mrs. Kennedy by the deed from her father. That deed expressly reserved a life-estate in the grantor, Thomas Jones, so that his act in permitting his daughter to lease it to his son and permitting him to sublease it to Davis was giving her something which the deed clearly entitled the father to retain, and was a parol

gift outside of the deed and without reference to his legal rights thereunder. The father being entitled to the possession by the express terms of the deed, the taking possession by the daughter, and the father's acquiescence therein, must be regarded as another act of kindness towards his daughter, and not as an interpretation of his or her legal rights under the deed. This being so, the gift of the \$33.33 from the sale of the logs, and the failure to object to his daughter taking timber to build an ice-house or for other purposes from the land in question, might also be referable to the natural disposition of the father to make gifts to his daughter without regard to his or her legal rights under the deed. These isolated and inconclusive acts of the father, of but short duration (he died in December, 1915), are not of such duration and unequivocal character as to be regarded in the construction of the deed.

In the Gas Case, *supra*, 46 Mo. l. c. 128, this court said: "It is true that evidence of such understanding should not be entertained when the language is clear and will admit of but one interpretation, because in that case, unless there is fraud or mistake *the language used is the best possible evidence* of the intention. Nor should any regard be paid to loose declarations or equivocal or isolated acts, but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and *in fulfillment of its conditions—every act pointing in the same direction*—may make their understanding as clear as the greatest precision of language." (The italics are ours).

The acts of the parties admitted in this case did not measure up to the standard thus required by the law to make them admissible. The court below, therefore, erred in refusing to give plaintiff's declaration numbered 7, declaring them inadmissible.

II. Mrs. Kennedy's deed from her father not covering the tract in question, there is no doubt that it passed to the plaintiff by virtue of his purchase and deed from



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the sheriff in partition. The description in his deed is all of said tract "lying north of Shoal Creek containing thirty acres more or less." The surveyors of **Partition.** plaintiff testified that the area north of Shoal Creek (running through the tract from west to east) was 27 and a fraction acres, including the tract in controversy, and excluding it, 22 and a fraction acres. It was all north of the line of the creek above indicated. Applying the same rules of construction heretofore applied to Mrs. Kennedy's deed, the deed of the sheriff to the plaintiff embraced and conveyed the land in question.

**Finding  
of Facts.** III. What we have said respecting the construction of these two deeds has been on the assumption that the areas and location of Shoal Creek, testified to by the surveyors for plaintiff, were substantially correct, but respondent's, while not denying seriously, do not admit such correctness. The lower court in its finding of facts omitted the facts relating to the areas of the different tracts and location and course of Shoal Creek in and through the property. In this respect it committed error. A statutory finding of facts, as this purports to be, should embrace all the material facts bearing on the issues involved, and should set them out in detail, and not merely state conclusions or inferences therefrom. Had the facts above indicated been found by the court, or admitted by the respondents, to be substantially as testified to by the surveyors, who testified for the plaintiff, our duty would be to reverse the case outright, and direct a judgment for the plaintiff. But, as the record stands, the judgment of the lower court must be reversed, and the cause remanded for another trial to be proceeded with according to the views herein expressed. It is accordingly so ordered.

• *Brown and Ragland, CC., concur.*

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

MALINDA E. DAMERON, Appellant, v. B. M. HARRIS,  
Administrator of Estate of J. H. PATTON.

Division One, March 2, 1920.

1. **ACCOUNT RENDERED: Implied Acquiescence and Promise.** An account rendered, showing a balance claimed by the creditor, unless objected to by the debtor within a reasonable time, is evidence that the debtor assented to it as correct and of an implied promise to pay the balance shown by it; and the rule applies to principal and agent, and to other persons who have business relations with each other, as well as to merchant and customer, or dealings between merchants.
2. ———: ———: **Reasonable Time.** What constitutes a reasonable time in which to object to an account rendered depends on the circumstances of the particular case. One circumstance is the local situation of the parties. Acquiescence for a whole year, without objection by the female owner of a large farm, in the itemized accounts rendered by her agent, accompanied by a letter explaining her overdraft and the amount credited on her note for money advanced by him, and calling attention to the balance, together with other letters written in the subsequent months to each other in which reference is made to the state of the account, amounts to an account stated, and in the absence of fraud, mistake or accident forecloses a readjustment.
3. ———: ———: **Readjustment: Continuous Account: Fraud or Mistake.** Acquiescence in an account stated does not preclude one of the parties from showing that certain items were not embraced in it, if a proper suit is brought to amend the adjustment for fraud, mistake or accident; but such a suit must proceed upon the theory that the account had been adjusted and items omitted which should have been included; if the demand is based on the theory that the account was a continuous one for twenty years, with no adjustment of it at any time, the only question of inquiry is whether there had been periodical settlements within those years, with such acquiescence therein for a reasonable time under the circumstances as render them accounts stated, and if the facts establish those things the settlements cannot be reopened.
4. ———: **Continuous Account: Periodical Settlement: Limitations.** The character of an account as a continuous or running one ceases at each periodical settlement thereof, and the Statute of Limitations commences to run from the date of the settlement against the implied promise to pay the balance shown thereby to be due.

## Dameron v. Harris.

5. ———: **Account Book: Entries by Amanuensis.** Entries made by the agent or under his direction, systematically, in the usual course of business and as minutes of the business, at the time the transactions occurred or as nearly so as the circumstances of the business will reasonably admit, whether made with his own hand or by other persons who wrote in his presence and pursuant to his orders, are regular and original entries, and the book in which they were made is competent evidence, in his favor and against him.
6. ———: ———: **Contemporaneous.** Regular entries in an account book made in the course of business to be competent as evidence and an exception to the rule against hearsay must be made at the time of the transaction noted, or soon enough after the event to be in the nature of *res gestae* and to render it unlikely that they were the result of a design to defraud, concocted by the entrant after the occurrence. But if they were made immediately following the transaction if it occurred in the office where the account book was kept, or promptly after the agent's return thereto from the place where the business was transacted, they are substantially contemporaneous, and competent.
7. ———: **Agent's Compensation: In Excess of Agreement: Acquiescence.** Unless the owner assented to a charge of one hundred dollars annually instead of fifty dollars for the services of her bailiff in managing her large farm and protecting her financial affairs, he was bound by his contract, regardless of the importance and onerousness of his duties. But where the increase was indicated in the itemized accounts rendered, the value of the services far exceeded the compensation, and the evidence clearly establishes that she acquiesced in the increased charge, he is not chargeable with such increase.

Appeal from Pike Circuit Court.—*Hon. Edgar B. Woolfolk*, Judge.

AFFIRMED (*upon condition*).

*Hostetter & Haley* for appellant.

(1) The referee erred in holding that decedent and plaintiff agreed on a stated account, and in holding that the account was closed at intervals during decedent's twenty years' management on the farm, and in holding that all items of account in plaintiff's claim which accrued more than five years before same was filed in the probate court were barred, and the circuit court likewise erred in adopting these views and findings of the referee. (2) The referee erred in not considering the items of the

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account even on his own theory, back as far as April 25, 1908, at which date he fixed the second break in the continuity of the account, and the circuit court erred in acquiescing in this position of the referee. "An account is not closed each time a footing is made and the balance carried to another column." 1 R. C. L. p. 206, par. 2. An account stated does not preclude the party denying its correctness from showing that certain items were not included therein. 1 R. C. L. p. 220, par. 20; 1 R. C. L. p. 210, par. 7. When it is fairly inferable from the conduct of the parties, while the account is accruing, that it is to be taken as one, then none of the items are barred by the Statute of Limitations unless all are; and if there be any item in the account within the five year period of limitation, then such item will draw all the items antedating such five-year period, so that none will be barred; and this is true even though all the items are on one side. *Chadwick v. Chadwick*, 115 Mo. 586; *Ring v. Jamison*, 66 Mo. 424; *Roberts v. Neale*, 134 Mo. App. 612. An account stated cannot become such merely by being presented by the one party to the other and the retention of the same by the latter without objection. If the party to whom the account is rendered has no knowledge of his own interests in the matters contained in the account, and had not the opportunity to acquire knowledge, as to its incorrectness as to omitted items in his favor, then such party is not bound thereby. It is only assent with knowledge which counts. 1 C. J. p. 686, sec. 264; 1 C. J. p. 714, sec. 353. Accounts between persons standing in confidential relations toward one another will be held open more readily than among persons dealing at arm's length; and complicated accounts will be opened up more readily than simple ones in the interest of the one who could not have had full knowledge. 1 C. J. p. 709, sec. 335; 1 C. J. p. 711, sec. 336. (3) The referee erred in admitting in evidence the "book account" alleged by defendant to have been kept by decedent, the circuit court sanctioning the ruling. In order to render an account book legitimate evidence, the entries must be contemporaneous with the transactions

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entered. *Nelson v. Nelson*, 90 Mo. 463. (4) The referee erred in finding on the issue of compensation \$100 per year instead of \$50 per year and the circuit court erred in upholding such finding of the referee. (5) In a compulsory reference, as in the case at bar the Supreme Court is not bound by the findings of either the referee or the circuit court, but can make its own findings from the evidence. It is not even controlled as to the weight of the evidence by the lower tribunals, as in ordinary cases involving issues of fact. *Williams v. Railway Co.*, 153 Mo. 487; *Buxton v. Debrecht*, 95 Mo. App. 599; *Caldwell v. Wright*, 88 Mo. App. 403; *Small v. Hatch*, 151 Mo. 300.

*Frank J. Duvall and Pearson & Pearson* for respondent.

(1) Every communication sent to Mrs. Dameron by J. H. Patton, containing a statement of their account, or any kind of a statement, together with a statement of the amount of the balance due to her from Col. Patton, or from her to Col. Patton, and not objected to by Mrs. Dameron within a reasonable time thereafter, constitutes an account stated, up to that date; and none of the items as to any other business transacted by him for her, previous to that date, are open to investigation. *Brown v. Kimmell*, 67 Mo. 431; *McCormick v. Sawyer*, 104 Mo. 43; *Powell v. Pacific R. R. Co.*, 65 Mo. 661; *Alexander v. Scott*, 150 Mo. App. 222; *Grocery Co. v. Hotel Co.*, 183 Mo. App. 435; *Keller v. Olson*, 187 Mo. App. 474. (2) The Statutes of Limitations commence to run from the time the account is stated. *Estes v. Hamilton-Brown Shoe Co.*, 54 Mo. App. 550. (3) Col. Patton was a farmer who kept an account book in which he entered the items of the various transactions he had, both with reference to the farm of Mrs. Dameron, which he was looking after, and other matters. This account book was properly identified and introduced in evidence. The items entered in it evidences of such transactions in favor of Col. Patton with Mrs. Dameron concerning this farm. Anchor Mill-

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ing Co. v. Walsh, 108 Mo. 285; Lyons v. Corder, 253 Mo. 549; Siegelman v. Rodgers, 113 Mo. 649; Schmidt v. Lightner, 185 Mo. App. 548. (4) His book account shows that Col. Patton had made an annual charge of one hundred dollars, as compensation for his services, and there had never been an objection made by Mrs. Dameron.

GOODE, J.—Prior to 1893, plaintiff's husband, James Dameron, died, leaving a last will, by which he devised to plaintiff, for her life, a farm of 640 acres, of which 200 acres lie in Lincoln County and 440 acres in Pike County. The farm is two miles south of Paynesville, in Pike County, where James H. Patton, known in the vicinity as Colonel Patton, resided. He was an experienced and prosperous farmer and had managed his own affairs well; so on October 1, 1893, plaintiff employed him to take charge of her farm for an indefinite period, as she intended to go to Bowling Green, in Pike County, for the sake of the health of one or more of her children, of whom there were living at that time one son and two or three daughters. Col. Patton was to be paid fifty dollars a year for his services, which began October, 1893, and continued twenty years, and until November 17, 1913. Meanwhile plaintiff and her family resided or sojourned for periods not definitely stated, at Bowling Green, Kirksville and Eolia, places not far away: at Hugo, Oklahoma, Hot Springs, Arkansas, and St. Louis. Col. Patton died in 1914, and on May 11, 1915, a demand against his estate for \$29,209.18, which is the subject-matter of the present proceedings, was presented to the probate court and later was lodged in the circuit court by appeal. The demand is for many items of indebtedness alleged to be due plaintiff on account of money received by Col. Patton for rent of the farm, or portions of it, the proceeds of crops, timber and other articles sold from the farm, which were never accounted for to plaintiff; overcharges for the services of deceased; rentals never paid to plaintiff; damage to the farm to the amount of \$2500, caused by cutting down timber trees, contrary

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to plaintiff's order; damage in the sum of \$3000, due to not rotating the crops to preserve the fertility of the soil, and permitting the fences and other improvements to get out of repair; and for \$3500, the value of corn, hay and other products of the farm which he is alleged to have surreptitiously converted to his own use. Attached to the statement of demand is an itemized account, composed of four hundred and seventy-six debits against the deceased and two hundred and five credits, showing the balance of \$29,209.18 in favor of claimant, the total debits amounting to \$47,466.12 and the credits to \$18,256.94.

Defendant's answer, as administrator of the estate of deceased, states that plaintiff knew what was being done on the farm during the years deceased managed it; that deceased kept a book account of all items of money received by him as plaintiff's agent and baliff, which showed for what they were received, and his disbursements connected with the management of the farm from the year 1893 to and including the year 1913; that said account covered not only the receipts and expenses of the farm, but money paid by deceased to plaintiff, or on her order during those years.

The answer also alleged that a true accounting was made to plaintiff by the deceased yearly, or oftener.

The bar of the Statute of Limitations was pleaded against all items of plaintiff's demand which accrued prior to the year 1910.

Defendant set up a counterclaim upon allegations that deceased, during the years from 1910 to 1913, inclusive, paid out for expenses in conducting the farm and to plaintiff, or others upon her order, sums in excess of his total receipts from the farm during those years, to the amount of \$1140.75, and that these payments were made at the request of plaintiff. An itemized account was attached as an exhibit and referred to in the answer, which showed a balance due defendant, as administrator, of the amount aforesaid.

On account of the multitude of transactions involved in plaintiff's demand, ranging over twenty years, the

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case was referred by the circuit court to Hon. L. G. Blair, who was directed to take testimony regarding the various items of the demand, make a full statement of the account between the parties, together with his findings thereon, and return the same with the evidence, into court. The evidence consisted of the testimony of nearly fifty witnesses and about two hundred and fifty exhibits, in the form of letters which passed between plaintiff and deceased, and checks drawn by her on her bank account, or by deceased for payments to her or others by her order, or for the expense of the farm. The referee found, and the numerous letters in evidence support the finding, that deceased kept plaintiff informed regarding his management of her affairs while he had them in charge; that he reported regularly about the crops raised and sold, collections made, contracts with tenants, the condition of the crops, the clearing of land and the cutting and sale of timber, lumber, and posts, repairs made and the expenditures therefor, the payment of premiums due on fire and life insurance policies held by plaintiff, the sums paid to her daughters and on her debts to other persons, and credits made on a promissory note of plaintiff to deceased; that he stated from time to time the balances of money in his hands belonging to plaintiff and subject to her order; notified her when she overdrew her account with the Clifford Banking Company; that he balanced her account from time to time, and sent her statements of the condition of the account. The referee found further that, by letter and orally, plaintiff, on several occasions, expressed satisfaction with the way deceased had conducted her business, and that the first complaint made by her was on December 5, 1913, which was about some matters deceased explained in a letter dated December 22, 1913, written in answer to her complaint.

Plaintiff resumed possession and management of the farm in November, 1913.

The referee held all items of the demand which accrued more than five years before May 11, 1915, when



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the claim was presented in the probate court for allowance, were barred by the Statute of Limitations.

Deceased kept in a book of accounts minutes of his transactions in handling plaintiff's business, and after his death a copy of said book account, showing the receipts and expenditures of deceased as bailiff, from October 1, 1893, to November 17, 1913, was furnished by the administrator of the estate to Dr. T. E. Garrett, plaintiff's son-in-law. It was found by the referee that the present demand is based, with few exceptions, on the various items of income from the farm shown by said copy of deceased's book account, but that credit is not allowed for many of the expenditures and other payments made by deceased and recorded in his book; and that whereas the deceased had entered a charge of \$100 a year for services, the plaintiff only gave the estate credit for fifty dollars a year, claiming deceased had agreed to serve for the latter sum.

Not only does the itemized statement attached to the statement of plaintiff's demand omit a large portion of the credits in his favor, which he had recorded in his book account, but it charges him with various debit items not shown in his book. These debits are for sums alleged to have been received in many ways; rentals collected, sales of produce from the farm, wood, timber, etc., sold by deceased or converted to his own use. But most of the sum of twenty-nine thousand dollars and more claimed to be due plaintiff, consists of the balance left after deducting some of the credits shown by the account book of deceased, and omitting many others noted as paid by him to plaintiff or for her, or for the expenses of the farm.

After ruling that the Statute of Limitations applied to all items of the claim which fell due prior to May 11, 1910, the learned referee proceeded to deal with the items charged against deceased in plaintiff's demand for the subsequent years, to-wit, from May 11, 1910, to May 11, 1915, and not noted in his book account. Of these items there were sixteen, and the referee rejected twelve

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of them, amounting to \$4963.33, and allowed four, which amounted to \$72.50. It thus appears the referee found that during the five years immediately preceding the presentation of plaintiff's demand, Col. Patton had become indebted to plaintiff in the sum of \$72.50, for receipts not charged against himself in his account book, and that items claimed by plaintiff to the amount of \$4963.33 ought not to be charged against the estate. Adding \$72.50 to the charges deceased had made against himself during said years in his book, the referee found the total amount of the debits against him for those years was \$7111.05. Taking up the counterclaim and considering the items of credits which the estate of deceased ought to be allowed for money paid by him during the five years to plaintiff or on her order, or for necessary expenses and repairs on the farm, etc., the referee found they amounted to \$8,912.26. Deducting the debits charged, \$7111.05, from that amount, it was found plaintiff was indebted to the estate in the sum of \$1801.21, and judgment was recommended for defendant and against plaintiff for that amount, notwithstanding the balance found was more than the administrator demanded in his counterclaim. Exceptions were duly filed by plaintiff to the report, and on the hearing of them the court confirmed the report, except as to a few minor items amounting to eighty dollars, which were charged against defendant and in favor of plaintiff, and except, too, the sum of \$661.21, allowed by the referee to defendant in excess of the total amount (\$1140) demanded by defendant in his counterclaim, which the court disallowed, leaving thereby a net balance of \$1060 owing to defendant. Judgment was rendered in his favor and against plaintiff for that amount. Plaintiff appealed from the judgment.

The following errors are assigned: first, the ruling that plaintiff and deceased had agreed upon a stated account at intervals during the twenty years; second, the ruling that the Statute of Limitations had run against all items which accrued more than five years before the presentation of the demand; third, in refusing to

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consider items as far back as on April 25, 1908, if, as the referee found, the account was then settled between the parties; fourth, the admission in evidence of the entries in the account book of deceased; fifth, the allowance of one hundred dollars a year to deceased for his services, instead of fifty dollars.

The referee found, and the circuit court accepted his finding, that the account between plaintiff and Col. Patton had been formally stated and settled by them three times during the period of the agency and on these dates: December 1, 1905, April 25, 1908, and January 13, 1913. One objection made to this finding is that plaintiff had no opportunity to learn whether the statements furnished by deceased were correct; presumably, because she was residing so far away from the farm as to preclude investigation. This fact, though it is not expressly mentioned in the brief for plaintiff, is the only one which stood in the way of her looking into her affairs and ascertaining whether the statements she received were accurate.

For a portion of the period of Col. Patton's agency, plaintiff dwelt near the farm and could easily have made inquiries; but an account of mutual dealings between two parties may be adjusted and settled by one rendering a statement to the other, even if the latter is absent from the place where the transactions occurred; although this circumstance will be considered in determining whether timely objection to the statement was made, thereby preventing it from acquiring the *status* of a settled account.

I. An account rendered, showing the balance claimed by the creditor, unless it is objected to by the debtor within a reasonable time, is evidence that the debtor assented to it as correct and of an implied promise to pay the balance as shown. [Powell v. Railroad, 65 Mo. 658; Koegel v. Givens, 79 Mo. 77.] What constitutes a reasonable time wherein to object depends on the circumstances of the particular case, and, as said, one circumstance is the local situation of the

Account  
Stated.

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parties. [Brown v. Kimmel, 67 Mo. 430; Martyn v. Arnold, 36 Fla. 446.] At an early day this court held, in accordance with the law elsewhere, that the doctrine of settled or stated accounts, although applied originally only to dealings between merchants, has been extended to other classes of persons who had business relations; a ruling since followed. [Shepard v. Bank, 15 Mo. 144; Brown v. Kimmel, 67 Mo. 430; see, too, McKeen v. Bank, 74 Mo. App. 281.] It applies, as well to the relation of principal and agent, as to that of merchant and customer. [McCord v. Manson, 17 Ill. App. 118; Ruffner v. Hewitt, 7 W. Va. 585.] Therefore as the rule is no longer confined to mercantile affairs, what was said in one case about the effect of the retention without objection, by a debtor who lived in this country, of statements of dealings rendered by a firm of merchants in England, is in point. In considering those facts the Supreme Court of the United States declared that "when one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objection, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him." [Freeland v. Heron, 7 Cranch, [U. S.] 147.] Treating the same point, it was held that a delay in objecting for two weeks after the reception of his account by a debtor, when the parties lived in the same city, tended to show he accepted it as accurate. [Mulford v. Caesar, 54 Mo. App. 263, 269.] So, it was said "an account which had been presented and no objection thereto had been made after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account." [Powell v. Railroad, 65 Mo. 658.] If the account between plaintiff and Col. Patton was stated by him to her on the three dates mentioned, as the court below found, the facts are that she never objected to the first and second statements, nor to the one of January 13, 1913, except a complaint contained in

a letter written by her in December of said year, more than eleven months after she had received the statement; but that complaint was directed against a small item (the amount claimed being \$35 and the value found by the referee \$5) for wood deceased was alleged to have used and not recorded. Far from complaining of the account rendered in January, 1913, a letter written to deceased July 23, 1913, says she felt that neither she nor her business could get along without him and that whenever she was in trouble he would lend her a helping hand. In October, 1913, she said to the deceased that if the farm had not been left to him years before "we would not have a dollar;" and on the same occasion Mrs. Garrett, plaintiff's daughter, said in the plaintiff's presence: "Mr. Patton, you have been a father to us. If it had not been for you I don't know what we would have done." In view of the foregoing facts we hold plaintiff's absence from her home did not prevent the statements rendered to her by Col. Patton from becoming evidence from which the finding might be made that their affairs were adjusted by mutual agreement, no objection having been made by her to the statements.

It is denied the evidence supports the finding that statements were rendered to plaintiff on the dates mentioned, and this denial calls for an examination of the facts. As regards the settlement of December 1, 1905, a letter written by the deceased to plaintiff on that date, after mentioning some particular transactions, said: "I balanced your account to-day and find you have overdrew [sic] \$269.76. I have sent you and the girls this year about \$1750." And on November 26, 1906, deceased wrote plaintiff another letter with her tax receipts for the years 1903, 1904, and 1905 inclosed. Therein he said: "I also send you statement of your account. I sent you a statement last year on *December first*, and you had overdrawn \$269.76." (Our emphasis.) Much correspondence passed between the parties after that letter, and in none of them did plaintiff either deny receiving the statement of December 1, 1905, or object to any item of it, or to the

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balance of \$269.76, shown by it to be due deceased. In said letter of November 26th, deceased gave a statement of further transactions since December, 1905, showing that he had paid out \$1697.50 in the interval and had received \$1695.95, leaving plaintiff overdrawn to the amount of \$1.55. In this connection another relevant fact is that the book account of deceased showed the account was balanced December 1, 1905, and the following entry made: "To balance due \$269.76." We approve the finding that the account between plaintiff and deceased was stated to her on December 1, 1905, and that she acquiesced in the statement and in the balance shown to be owing to deceased.

Regarding the second settlement of April 5, 1908, Ed M. Forgey, a witness who sometimes made entries for deceased in the latter's book, testified that on said date he balanced the account between plaintiff and deceased, and entered these minutes: "April 25, 1908, to balance \$180.55; April 25, 1908, balance carried to page 250, \$180.55;" that at the request of Col. Patton he prepared an itemized list of the transactions between the parties from October 31, 1906, to April 25, 1908. As bearing on the question of whether plaintiff received that statement, we notice an excerpt from a letter of deceased of the same date, introduced in evidence by the plaintiff: "Enclosed please find note of \$321, including int and receipt of \$900 to credit on note of \$1100, which leaves a balance of \$180.55 due you on my account. Thinking perhaps you might need some money on urgent call I have left the amount of \$180.55 due you on my books." A year later, in 1909, plaintiff gave deceased a note for \$350 to balance her account which she had overdrawn; and neither in the letter inclosing the note, nor in any other, did she complain that the statement by deceased in his letter of April 25, 1908, of the amount due her (\$180.55) was incorrect. We approve the finding that there was a settlement of accounts between plaintiff and deceased on April 25, 1908, which was acquiesced in by her and that said settlement showed deceased then owed her \$180.55.

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As to the third statement of January 13, 1913, deceased wrote to plaintiff, among other things, as follows: "Enclosed please find statement of account. I have paid out \$946.81 since our last settlement. I have received since that time \$1194.34, leaving a balance of \$284.53 in my hands." (The referee found the balance stated was too large owing to an error in calculating, and that it should have been \$248.53.) In a letter written December 26, 1912, by F. W. Patton, who sometimes acted as amanuensis for the Colonel, he said: "The Colonel says he will send you a statement soon." A statement was sent plaintiff which embraced the items from February 7, 1910, to January 9, 1913, and showed a balance due deceased of \$248. It was accompanied by a letter dated December 9, 1913, which said: "This statement and the statement I sent you runs back three years. I hope you will find it all O. K. Anything further you wish to know, let me hear from you and we will try to explain." The corresponding entry on the account book was this: "January 13, 1913. To balance due \$248.53." Plaintiff introduced in evidence an exhibit headed, "Statement of Mrs. M. E. Dameron's Account," which was taken from the account book of deceased. It runs from January 13, 1913, to November 17, 1913, and the first item of January 13th is \$248.53, the exact amount of the balance shown by the previous statement of January 13, 1913. On those facts we approve the finding that the account between the parties was settled on January 13, 1913. We add that in addition to those formal statements which were found to have been acquiesced in by plaintiff, deceased wrote her quite a number of letters, in each of which he mentioned a balance in his hands to her order.

II. It is further said the fact that an account between parties who have had mutual dealings has been stated, does not preclude one of them from proving certain items were not embraced in it. This is true if the proper suit is brought to amend the adjustment for fraud, mistake, accident, etc.; but

**Readjustment.**

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the plaintiff's demand does not proceed on the assumption the account between her and the deceased had been adjusted and items omitted which should have been included. Her demand is based on the theory that the account was a continuous one for twenty years with no adjustment of it at any time. This point was adjudicated in a case where the plaintiff claimed the right to recover for extra work and materials done and furnished by him and not included in his contract. There was found to have been a settlement of the account between the parties covering all the work and materials involved; wherefore the court rejected the contention that the plaintiff could proceed for alleged omitted items "as if no settlement had been made." The court held that when parties, having mutual matters of account between them, growing out of a contract, deliberately account together and state a balance, the settlement cannot be reopened or gone into except upon proof of fraud or mistake or that certain matters were intentionally omitted from the settlement. [McCormick v. Transit Ry. Co., 154 Mo. 191, 201.] In another case it was said that "the presumption is that all previous dealings between the parties relating to the subject-matter of the account, are adjusted." [Pickel v. Chamber of Commerce, 10 Mo. App. 191, 195.] Even were it conceded, as it is not, that the probate court would have jurisdiction to open up the settlement for fraud or mistake, neither in her statement of demand nor other pleading, did plaintiff attack the settlements, but contended throughout there had been none.

III. The second error assigned is for barring by limitation those of the items demanded which accrued prior to May 11, 1910. The character of the account as a continuous and running one ceased at each settlement of it and the statute commenced to run from that date against the implied promise to pay the balance shown by the settlement. [Coudrey v. Gilliam, 60 Mo. 86; Estes v. Hamilton-Brown Shoe Co., 54 Mo.

**Limitations.**



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App. 543; Gunn v. Gunn, 74 Ga. 555: Harrison v. Hall, 8 Mo. App. 170.]

Counsel hardly controvert the proposition last stated, but argue as one of their assignments of error that if there was an adjustment of the account on April 25, 1908, the referee and the court should have considered the items which accrued after said date and up to May 11, 1910, as being parts of a continuous account from said April 25th, as well as those which accrued after the later date. The account between the parties having been settled January 13, 1913, the referee should not have gone farther back in considering the various debits and credits. The reason he assigned for doing so was that defendant in his counterclaim requested allowances for disbursements during the years 1910 to 1913, inclusive; that is, both parties were asking for relief regarding transactions during those years. In this respect we think the learned referee and the court below fell into error. Plaintiff did not ask that items back to 1910 be considered save as they were embraced in the entire list back to April 25, 1908; or to be more exact, back to the beginning of the agency of the deceased in 1893. We cannot say plaintiff would have gained nothing had the referee passed on the transactions of every year after April 25, 1908, if said date was to be regarded as that of the last settlement. Maybe plaintiff would have been benefitted by considering matters between 1908 and 1910. The last settlement was on January 13, 1913, which showed the balance then due the deceased was \$248.53.

As shown above, another account running from January 13, 1913, to November 17, 1913, and covering the remainder of the period of the agency, was rendered. This account was not acquiesced in, at least some of it was not; and the only transactions open to investigation on the merits were of that period. Now every item for the year 1913, which is noted in plaintiff's demand, corresponds with the statement deceased rendered for that year, except six charges against him, amounting to \$351, and twenty credits claimed by him, amounting to \$321.84.

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The referee rejected all the charge items as not established, except two, to-wit, \$20 for gravel and \$25 due on a note given by the tenant Guy, or \$45 for both. All the credits shown on the statement rendered by Col. Patton for the year 1913, and not allowed him in plaintiff's statement of demand for said year, were allowed by the referee. The result would be to reduce by forty-five dollars the balance due deceased on November 17, 1913, \$1086.09, the sum shown by his statement, leaving the amount due him \$1041.09. The referee's finding of \$1801.21 was reached by including credits back to 1910, an amount the court cut down to \$1060 by rejecting the excess found by the referee above the amount demanded by defendant in his counterclaim and by charging the estate with two or three small amounts the referee had denied.

IV. The fourth error assigned is the admission in evidence of the entries of deceased in his own favor in his account book, those against him being regarded as competent for the reason that they were admissions opposed to his interest. The argument is that the credit entries were incompetent because not shown to have been in the handwriting of the deceased, nor to have been made at the time

Account Book  
as Admissions.

the transactions they related to occurred. The proposition only affects the affairs between the parties of the year 1913, for we have held the account was balanced and settled on January 13, 1913. The account book was proved to have been one wherein deceased kept a record of his business affairs, not only those between himself and plaintiff, but also those between him and other persons. His office was in Paynesville, where he lived and where the bank was located in which he deposited money to plaintiff's account and against which she drew checks. Paynesville was only two miles from the farm, and the conclusion to be drawn from the evidence is that deceased made entries in the book at his office after he had transacted business at the bank or on the farm. Many of

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the entries he made in person, but he often called on Ed Forgey, Arthur Forgey, and his brother F. W. Patton and his nephew W. L. Patton, to enter items for him. It is in testimony that F. W. Patton was accustomed to assist him in keeping this book; also that the Colonel had used the book for twenty years. In a long examination and cross-examination of W. L. Patton about numerous entries the witness testified they were in the handwriting of one or the other of the persons mentioned; that the book was the one in which the Colonel made the "original entries in all business transactions;" that when entries were made regarding deals on the Dameron farm, Col. Patton produced memorandums he had made at the farm at the immediate times of the transactions and would ask the witness to enter them in the account of Mrs. Dameron; that the entries written by the witness were made not at the time of the transaction, "but as close as a man could do so;" that the Colonel did most of his business in the office, when he entered a transaction at the very time it took place, but if he was out at the farm he would put it in his book and enter it as soon as he could; that his custom was to do so as soon as he got to the office; that when the entries were made Col. Patton would be present and would direct them. This happened not only when the witness himself was doing the writing, but also when his father was. Another witness, Ed Forgey, testified that he wrote in the book for Col. Patton as a matter of friendship; was asked about entries on various pages, said he had made out statements for Mrs. Dameron from the book. Testified also as to various entries in his handwriting; that he had seen the Colonel write entries himself; that it was a book of original entry of the Colonel's business transactions; never kept any other book of account; that the Colonel made the entries from memory. Dr. Garrett, a son-in-law of plaintiff, testified that he went over some of the pages of the book with Col. Patton once or twice, and that the Colonel showed him this book "as a book of his original entries he kept his account in."

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That the entries in question were made by the Colonel or under his direction, systematically, in the usual course of business and as minutes of business, is beyond doubt. We consider it immaterial that many of them were made by other persons, since the testimony shows these persons wrote in the presence of deceased and pursuant to his orders; in other words, they acted as mere amanuenses to relieve him of the distasteful labor of writing. [2 Wigmore, Evidence, sec. 1530, p. 1894; 1 Greenleaf, Evidence (16 Ed.), p. 206; Stanley v. Wilkerson, 63 Ark. 556; American Surety Co. v. Pauly, 38 U. S. App. 254.]

As regards the time when the transactions were entered as compared with when they occurred, this was shown to be immediately following the transaction if it occurred in the office where the book was kept, or if it did not, as soon thereafter as the Colonel returned to the office. Regular entries in the course of business to be competent as evidence and an exception to the rule against hearsay, must be made at the time of the transaction noted. They must be in the nature of *res gestæ*, or at least written soon enough after the event to render it unlikely they were the result of a design to defraud concocted by the entrant after the occurrence. In Anchor Milling Co. v. Walsh, 108 Mo. 277, it was said the entry to be competent must be written at the time, or nearly so, of the principal fact. Neither the adjudications nor the text-works define with precision what is meant by "contemporaneous," in connection with this rule of evidence. Wigmore says to be admissible, "the entry should have been made at or near the time of the transaction recorded—not merely because this is necessary in order to assure a fairly accurate recollection of the matter, but because any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously. The rule fixes no precise time; each case must depend on its own circumstances." [2 Wigmore, Evidence, sec. 1526, p. 1892.] Greenleaf states the rule as follows: "The entry must be fairly contemporaneous with the event recorded, though no precise time can be fixed as the limit." [1

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Greenleaf on Evidence (16 Ed.), sec. 120a, p. 205.] Another treatise says it should be made at or about the time. [4 Chamberlayne, Evidence, sec. 2870.] And again, that it must be "substantially contemporaneous." [Id. sec. 2890, p. 4018.] Again, that it must not be unreasonably remote from the occurrence of the events. [Id. sec. 2890, p. 4020.] It was, of course, impossible for deceased to record in his book transactions at the farm the instant they occurred; although it was proved he kept memorandums of those transactions and from them, or his memory, entered the items in the book as soon as he could do so, usually when he reached his office. We hold the book account consisted of regular and original entries which made it competent as evidence.

V. The fifth assignment relates to the allowance of one hundred dollars a year to deceased, whereas his contract was to serve for fifty dollars. In the several statements rendered by him, including that of 1905, he credited himself with one hundred dollars for his services. It is true the original contract was for fifty dollars, but he appears to have conceived that he ought to be paid more. Of course unless plaintiff assented to the change, deceased was bound by his contract, regardless of how onerous and important his duties were. But their scope is a circumstance to show plaintiff did assent to an increase. Col. Patton was not only the bailiff of plaintiff in the management of the farm, but the correspondence shows he was her general financial adviser, helped her in the matter of procuring loans, paid her insurance premiums, warned her against her daughter's spending too much money, notified her about overdrafts at the bank, took up and carried a note of hers which was secured by a mortgage on the farm, when the holder of the note was threatening to foreclose; in short, looked after every interest of plaintiff in the vicinity of the farm. She made no objection to the claim for increased compensation shown by the statements rendered, and long afterwards expressed satisfaction

**Agreed  
Compensation.**

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with the way deceased had managed her business. No other conclusion is possible, except that the increased credit of one hundred dollars, claimed for years before the agency of the Colonel ceased, was acquiesced in by plaintiff.

It is proper to say that two items in plaintiff's demand, one for \$2500 for damage to the farm by cutting timber and one for \$3000 damage caused by non-rotation of crops, were wholly unproved and were rightly ignored by the referee and the court below.

It is unnecessary to reverse and remand the cause for the error in dealing on their merits with transactions antecedent to the last settlement. We have examined the findings on the items subsequent thereto and accept the conclusions of the referee and the court below.

We find that forty-five dollars of charges ought to be deducted from the \$1086.09, the amount due deceased on November 17, 1913, as shown by the statement rendered November 19th, leaving the sum due \$1041.09. If defendant will remit, within ten days, said sum of \$45 from the judgment, it will be affirmed; otherwise, it will be reversed and the cause remanded with an order to determine on the merits the several items of debit and credit that ought to be allowed for transactions after January 13, 1913. All concur.

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W. G. DONOHUE, Appellant, v. SOUTHWESTERN  
SURETY INSURANCE COMPANY.

Division One, March 2, 1920.

1. **APPEAL: Non-resident Insurance Company: Twenty Days' Notice.** A foreign insurance company, licensed to do business in this State, but having no agent, office or other place of business in the county in which the cause was tried before a justice of the peace, has twenty days, under the statute (Sec. 7568, R. S. 1909), within which to take its appeal from the judgment rendered by the justice, and is not required to take the appeal within ten days after the rendition of judgment.

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2. ———: ———: **Statute.** The statute (Secs. 7398 and 7399, R. S. 1909), authorizing process to be served on the Superintendent of Insurance where the defendant is a foreign insurance company licensed to do business, but having no place of business, in this State, does not render the company a resident of the county in which plaintiff resides and in which it has been sued before a justice of the peace, but only confers jurisdiction; as to the time within which it must take an appeal from a judgment rendered by the justice, it still remains a non-resident of the county.
3. ———: **Affidavit and Bond: Wrong Name: Amendment.** An appeal from a judgment of a justice of the peace should not be dismissed because the affidavit and bond therefor were not made in the name of the appellant, if before a motion to dismiss is ruled an amended transcript showing the appeal had been taken in its true name is sent up, and an amended affidavit and bond, made by permission of court and by the same affiant and surety, are filed.
4. ———: **Dismissal of Case at Return Term.** Where the notice of an appeal from a judgment rendered by a justice of the peace was so defective as to constitute no notice, and appellee at the return term filed his motion to dismiss on the ground that no notice had been given, and appellant, before the motion was ruled, by permission of court filed an amended transcript and an amended affidavit and bond, and thereupon the motion was overruled, it was error to call the case for trial and, upon the appellee's refusal to plead further, to dismiss the case at said return term, for appellee's motion to dismiss was not an exercise of his option to try the case at said term, but his refusal to plead further was a protest against being forced to trial at a term at which, under the statute (Sec. 7583, R. S. 1909), the cause was triable only at his option.

TRANSFERRED FROM KANSAS CITY COURT OF APPEALS.—  
*Hon. Alonzo D. Burnes, Judge.*

REVERSED AND REMANDED.

*R. H. Musser* for appellant.

(1) Appeals from the justices of the peace, as well as all appeals, are purely of statutory origin, and the Legislature has the right to impose such conditions and restrictions as it sees fit. 3 C. J. 318; 319; Sec. 7567, R. S. 1909; *Nathan v. Oil Co.*, 187 Mo. App. 563; *Bussier v.*

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Sayman, 257 Mo. 303; Rauck v. Merrill, 172 Mo. App. 489; Sidwell v. Jett, 213 Mo. 609; Caruthersville v. Barnett, 149 Mo. App. 162; Petz v. Hoffman, 149 Mo. App. 153; Clopper v. Bradshaw, 163 Mo. App. 587. (2) The notice of appeal in this case was wholly insufficient, and the plaintiff did not by filing his motion to dismiss the appeal and attacking the jurisdiction of the court, enter his appearance to the case. There was no case of the character described in the notice on the docket of the court; there was no case appealed such as was docketed; the affidavit for appeal, bond in appeal and notice of appeal were all of the Southern Surety Company case and the substitution allowed did not, if it was correctly done, waive the very plain provisions of the statutes. Secs. 7568, 7570, 7582, 7584, R. S. 1909; Drake v. Gorrell, 127 Mo. App. 636; Huffman Bros. v. Morris, 1190 Mo. App. 386; Auto Co. v. Figgins, 188 Mo. App. 689; Nobel v. Bockhurst, 186 Mo. App. 503; Bartschat v. Downey, 172 Mo. App. 636. (3) The appellant could not, by having the justice amend his record, confer jurisdiction on the circuit court; there was no bond in appeal nor affidavit for appeal supporting other than his original record, and no further notice of appeal was given. Clapper v. Bradshaw, 163 Mo. App. 587; Rauck v. Merrill, 172 Mo. App. 489. (4) Causes first stated herein affirmatively show that statutory requirements for the appeal from the justice of the peace were not complied with, so that the circuit court had no authority to further proceed with the case; in addition to these, jurisdiction was not had by said circuit court, for the further reason that the Southwestern Surety Insurance Company was under the law a resident of the State and of each county and township therein. Young v. Niles Scott Co., 122 Mo. App. 402; Meyer v. Insurance Co., 184 Mo. 486; Sears on Mo. Corporations, sec. 375; Fitzmaurice v. Turney, 214 Mo. 627; Crutsinger v. Railroad, 82 Mo. 66; Slavens v. Railroad, 51 Mo. 310; Harding v. Railroad, 80 Mo. 661; Rodgers v. National Council, 172 Mo. App. 719. (5) By taking out a license to do business in the State of Missouri, and appointing



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the Superintendent of Insurance as its agent to receive service of process, defendant acquired a constructive residence in each and every county of the State, so that it had only ten days within which to perfect its appeal from the justice. *Rodgers v. National Council*, 172 Mo. App. 719; *Meyer v. Ins. Co.*, 184 Mo. 481; *Kennedy v. Ins. Co.*, 165 Pa. St. 179; *Weeron v. Ins. Co.*, 166 Pa. St. 112; *Burridge v. Ins. Co.*, 211 Mo. 180; *Sidway v. Land & Live Stock Co.*, 187 Mo. 649; *Dougan v. Sun Fire Office*, 39 Mo. App. 676; 19 Cyc. 1254; 12 R. C. L. 35, 50, 57, 64, 78, 108.

*Frost & Frost* for respondent.

(1) If the defendant had an agent in the county transacting its business, then the rule would be different. *Young v. Niles Scott Co.*, 122 Mo. App. 392. This same doctrine has been for years applied to railroads. *Slavens v. Railway*, 51 Mo. 309; *Crutsinger v. Railway*, 82 Mo. 64; *Fitzmaurice v. Turney*, 214 Mo. 626; *Julian v. Kansas City Star*, 209 Mo. 100. The defendant was a non-resident corporation without any agent in the county and it had twenty days in which to take an appeal. *Spangler v. Protective Assn.*, 172 Mo. App. 255; Sec. 7568, R. S. 1909. (2) The lodging of the transcript of the justice gave the circuit court jurisdiction of the cause, and the only object of the notice is to give it jurisdiction of the person. *Ford v. Gray*, 131 Mo. App. 344; *Bartschat v. Downey*, 172 Mo. App. 636; *Drake v. Gorrell*, 127 Mo. App. 636. (3) The motion filed by the appellant in this cause was not motion for affirmance or dismissal for failure to give statutory notice, but was a motion to dismiss the appeal because "the said defendant was and is a resident of Clinton County, State of Missouri, and no appeal was taken or allowed to said defendant at any time within the time allowed by law" and because "no affidavit for an appeal or any appeal bond has been made by the defendant to this action," and other grounds. This motion did amount to an appearance by the plaintiff and dispensed with the statutory notice. *Bartschat v. Downey*, 172 Mo.

App. 636. These appearances were entirely independent of his appearance on his motion to dismiss. How could plaintiff be heard to enter his objections and exceptions to the action of the court and be found objecting to steps taken by the appellant therein in said cause without appearing in said cause? Furthermore, his motion to dismiss did not confine his appearance for that purpose only, nor did he ask the dismissal on the ground of failure to give notice, nor could he have done so, as a motion on such a ground would not have been entertained until the next term of court, as that was the first term after the appeal. Furthermore, the judgment in this cause itself shows that plaintiff was in court for all purposes. (4) Refusing to plead amounted to refusing to make defense. 30 Cyc. 1644. (5) On filing of papers by the justice in the clerk's office the circuit court becomes possessed of the cause, and same cannot be dismissed for want of bond and affidavit if appellant file bond and affidavit before case is dismissed. *Welsh v. Railway*, 55 Mo. App. 599; *State v. Cook*, 33 Mo. App. 57; Sec. 7580, R. S. 1909.

**BROWN, C.**—This cause comes to us upon the certificate of the Kansas City Court of Appeals that its opinion and judgment sustaining the judgment of the circuit court is in conflict with the opinion and judgment of the St. Louis Court of Appeals in *Rodgers v. National Council*, 172 Mo. App. 719.

The case is well stated in the opinion of the Kansas City Court of Appeals as follows:

“Plaintiff, on December 23, 1916, in a suit before a justice of the peace in Clinton County, obtained judgment for \$124 against defendant upon a policy of accident insurance. The defendant is a foreign insurance company duly licensed to transact its business in Missouri, but having no local agent in Clinton County upon whom service could be had, and service was made upon the Superintendent of Insurance at Jefferson City in Cole County. On the 20th day from the rendition of judgment, defendant was allowed an appeal to the Cir-

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cuit Court of Clinton County. The appeal was returnable to the April Term, 1917, of said circuit court, and the justice promptly sent up the transcript and papers to that court.

"It seems that the appeal bond filed in the justice court was in the name of 'The Southern Insurance Company' as principal, instead of 'The Southwestern Surety Insurance Company,' and that the notice of appeal that was given, as well as the affidavit for appeal, were made under the caption of the case entitled, 'W. G. Donohue v. Southern Surety Company.'

"At the April term, plaintiff filed a motion to dismiss the appeal based on two grounds: (1) That no affidavit for appeal and no appeal bond had been filed by the defendant in the case. (2) That no appeal had been taken or allowed to said defendant within the time allowed by law. At the same time defendant filed a motion to have the justice send up a correct transcript of his record, and this was done. Upon its appearing that the appeal had been allowed by the justice to the Southwestern Surety Insurance Company, the court permitted the corrected transcript to be filed, and thereupon, the defendant by leave of court, filed a correct affidavit and appeal bond, and later the court permitted defendant, through its attorney who made the affidavit and who was also the sole surety on the appeal bond, to amend same by inserting the word 'Insurance' after the words 'Southwestern Surety' and before the word 'Company' in the defendant's name wherever the same appeared in said affidavit and bond.

"Plaintiff's motion to dismiss was then overruled. Thereupon the cause was called for trial and the plaintiff refusing to plead further, the court dismissed the case. Plaintiff then appealed." [Donohue v. Southwestern Surety Insurance Co., 202 S. W. 272.]

I. The controlling question in this case, and the one upon which it has been certified to us by the Kansas City Court of Appeals, is whether or not a foreign insurance company having no agent, office or other place

of business in the county in which the cause was originally tried before a justice of the peace, **Timely Appeal.** must take its appeal from the judgment of the justice within ten days from the time of its rendition or has twenty days for that purpose. This depends entirely upon the question whether or not the Insurance Company is, for that purpose, a resident or non-resident of the county within the meaning of the following provision of Section 7568, Revised Statutes of 1909: "The appeal must be made within ten days after the judgment was rendered, but if a non-resident of the county where the suit shall be instituted, the party shall, in all cases of appeal allowed by this article, have twenty days to make such appeal." It is contended by the Insurance Company that it comes within the terms of the clause last quoted, and that therefore its appeal taken within twenty days was timely. There can be no doubt of the correctness of this proposition if the word "non-resident" is to be construed according to its literal meaning, but the appellant contends that, for the purpose of this appeal, the respondent acquires the status of residence by virtue of certain statutory provisions to which we will presently refer.

Foreign corporations generally are prohibited from transacting business as such in this State without complying with certain prerequisites and obtaining from the Secretary of State a license therefor, and establishing and maintaining an office for the transaction of their business in this State where legal service may be obtained upon them. [R. S. 1909, sec. 7040.] Foreign insurance companies doing business in this State, being under direct supervision of the Insurance Department, are required (Id. sec. 7042) to file with the Superintendent of the Insurance Department a written instrument or power of attorney appointing and authorizing the Superintendent of the Insurance Department to acknowledge or receive service of process issued from any court of record, justice of the peace or inferior

court, and upon whom such process may be served in all proceedings instituted against them. This last provision, it is contended, makes the foreign insurance company not only a resident of the State for all the purposes of any such legal proceeding, whether involving the service of legal process or not, but also a resident of each particular county as distinguished from all others. The plaintiff may leave his home where the defendant Insurance Company stands waiting at his door, and seek his remedy wherever he may find an atmosphere favorable to his cause. As we have stated in *Meyer v. Insurance Company*, 184 Mo. l. c. 489: "An individual can reside in only one county at a time, whereas the statute makes a foreign insurance company a resident of every county in the State for the purpose of a suit against it."

Assuming that this proposition correctly states the meaning of the statute under consideration in its application to the question of jurisdiction then before the court, we are still far from determining its application to the question in this case, which is whether the defendant, being already in court, was entitled to twenty days in which to make its appeal. It cannot be contended that the statute in question, without using the word resident or residence in any form, or any equivalent words, has made the insurance company a resident of each county in this State for all the purposes implied in the omitted word. The statute which authorizes process to be served on the Superintendent of Insurance, upon which the jurisdiction is founded in this case (B. S. 1909, sec. 7398; also *Id.* sec. 7399), gives jurisdiction in cases where the defendant is a non-resident of the county in which the plaintiff resides, to a justice of the peace of any township in such county where he may be found, and where the defendant is a non-resident of the State, to any justice of the peace of any county in the State wherein defendant may be found. None of these statutes, by conferring jurisdiction over the non-resident, brings him into the county or State

for any other purpose. So far as the time for taking his appeal is concerned he remains a non-resident of the county still. The non-resident of the county who comes into the jurisdiction is served and judgment rendered against him. When he desires to appeal, his distance from his home is taken into account and the law grants him time on that account. It extends the same clemency and favor to the non-resident of the State who is caught within the jurisdiction. The foreign insurance company, as far as this law is concerned, stands on the same footing. It is forced into the jurisdiction as a condition for the transaction of business in the State, but is not by the words or any reasonable implication of the law excepted from the statutory grant of favor as to the time allowed for his appeal. The plaintiff as we have said might leave his own home and go to the most inaccessible county in the State to bring his suit, but the Legislature reasonably and justly permits the defendant time to go and return for the purpose of taking his appeal.

This intention is shown in the very section we are now construing (Section 7042): "In case such process is issued by a justice of the peace or other inferior court, the same may be directed to and served by any officer authorized to serve process in the city or county where said Superintendent shall have his office, at least fifteen days before the return day thereof, and such service shall confer jurisdiction." While in other cases ten days only are required between the service and return day, fifteen days are expressly allowed in this State-wide proceeding. In this the Legislature expressly recognizes its *status* of non-residence.

We think the appeal was taken in time. The Kansas City Court of Appeals arrived at the same conclusion in an opinion in which it cites and reviews the authorities applicable and in which we fully concur, and which we adopt as our own. [202 S. W. 272.] What we have here written is only to suggest a different standpoint from which the question may be approached.

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II. The judgment of the justice of the peace from which the appeal to the Circuit Court for Clinton County was taken was against this respondent, and the appeal was returnable to the April term of the circuit court. This appellant appeared in the circuit court at that term and filed his motion to dismiss the appeal, assigning as grounds therefor that no affidavit or recognizance for appeal had been filed before the justice. The defendant at the same time filed a motion for a rule upon the justice to send up an amended transcript, which showed that the appeal had been allowed in the proper name of the appellant, and thereupon a hearing was had and the circuit court made an order permitting the true name of the defendant to be inserted in the affidavit and bond, which was done by the defendant's attorney who made the affidavit and was sole surety on the bond, and the cause was thereupon permitted to proceed.

**Affidavit  
and Bond.** We do not think there was any error in this. It was done in compliance with the terms of Section 7580, Revised Statutes 1909, which provides that "no appeal allowed by a justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance made or given is defective or insufficient, if the appellant or some person for him will, before the motion to dismiss is determined, file in the appellate court the affidavit required, or enter into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission, with respect to such affidavit or recognizance."

This statute speaks for itself. The circuit court obtained its jurisdiction from the allowance of the appeal by the justice, and thenceforth it was its duty to determine whether the appeal had been properly taken and to determine how its statutory jurisdiction should be exercised. The fact that these deficiencies were supplied by amendment to the original affidavit and recognizance could make no difference, as all the

parties affected by the alteration were before the court and bound by its action in connection with their own.

III. A more serious question is presented by the action of the circuit court in dismissing the plaintiff's action at the return term of the appeal.

Section 7583, Revised Statutes 1909, provides: "If the appellant fail to give notice of his appeal when such notice is required, the cause shall, at the option of the appellee, be tried at the first term, if he shall enter his appearance on or before the second day thereof, or, at his instance, shall be continued as a matter of course until the succeeding term, at the cost of the appellant; but no appeal shall be dismissed for the want of such notice. When, however, the appellee enters his appearance and demands trial as provided for by this section and the appellant fails to appear, the judgment on motion of appellee shall be affirmed."

The only notice of the appeal from the justice of the peace in this case consisted of a written statement that the "Southern Surety Company" had taken an appeal from the judgment of Joseph Brown, a justice of the peace, on the 23rd day of December, 1916 for ——— dollars and costs in favor of plaintiff and against the Southern Surety Company returnable at the April term of the Circuit Court for Clinton County. That this notice was so defective as to constitute no notice under the statute seems to us to be evident. It was signed "Southern Surety Company." The name bore no natural relation to the defendant, which is an insurance company by name as well as in fact, and not a surety company at all so far as appears in the record. The description referring to its location contained no synonym of "Southwestern," which performs that office in the name of the defendant. While it is not probable that the plaintiff was an habitual litigant and could therefore guess that it referred to the suit of the insurance company whose policy he held, we are not at liberty to depart from a rule which requires the es-



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sential elements of legal process to be stated, and not left to mere inference. The object of the requirement of reasonable certainty in the statement of a fact as notice of its existence in legal proceedings is to avoid the possibility of concealment in cases where concealment may be practicable and desirable. We think it would be dangerous to hold that this paper is sufficient notice of the appeal of this case. Some such idea was probably in the mind of the Legislature when, instead of providing a procedure for cases in which the appellee did not know of the appeal, it included all cases in which the notice required by law had not been given.

Although this section is somewhat complicated in its construction it plainly provides that if the appellee shall appear on or before the second day of the return term the case shall, *at his option*, be tried at that term, and that if he shall appear at the return term and *demand* trial, and the appellant shall not appear, the judgment shall, upon motion of the appellee, be affirmed. The question presents itself whether, in this case, the appellee exercised his *option* to try the case. His appearance consisted in the filing of a motion to dismiss the appeal on other grounds than the failure to give the statutory notice, and his statement that he would not plead further. Whatever else this might mean, it was not a demand for trial at that term. The utmost that we can assume is that it indicated his purpose not to try at that term. He had come to exercise his right to have the appeal dismissed unless his opponent should file a sufficient affidavit and recognizance before his motion should be determined. [Id. Sec. 7580.] The appellant elected to do this, thereby confessing that the motion of the appellee was well taken, and it now contends that its filing was not only a general appearance in the case, but an exercise of the option to try at that term. We do not think so.

When the amended affidavit and recognizance were filed and the plaintiff's motion to dismiss the appeal was overruled, the court made the following entry: "The said cause coming on for trial, the plaintiff re-

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fused to plead further than the motion to dismiss, whereupon the court ordered said cause to be dismissed. Whereupon, the said cause was dismissed of record in said court."

This refusal to "plead further than the motion to dismiss" amounted to nothing more than a protest against being forced to trial at a term in which the cause was triable only at his option. He had been successful in forcing the appellant to perfect its appeal by amendment to the affidavit and recognizance, and thereupon the case stood as if the appeal had been well taken and no notice given. It was error to dismiss the cause for failure of the plaintiff to proceed to prove his case which he was under no duty to do at that term. This error appearing upon the face of the record the judgment of the circuit court must be reversed, and the cause remanded for further proceedings; and it is so ordered. *Ragland* and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

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ALINDA H. VORDICK, Appellant, v. AUGUST H. VORDICK, Deceased; WILLIAM H. HAUSHULTE, Executor of Will of AUGUST H. VORDICK.

Division One, March 2, 1920.

1. **JURISDICTION: Usurpation.** Under a constitutional government the acts of a court not within its powers prescribed by the organic law are usurpations, and when done by a court of last resort may become a grave menace.
2. —: **Divorce: Other Issues.** Divorce *per se* is not one of the cases named in the Constitution in which an appeal lies to the Supreme Court, and if it has jurisdiction to review a judgment for divorce on its merits it must be because it involves some issue which brings it within the enumeration of specific cases wherein it is given appellate jurisdiction.

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3. ———: ———: **Alimony: Amount in Dispute: How Ascertained.**

Where the trial court granted the wife a divorce and alimony in the sum of \$5,000, and the only possible ground upon which the Supreme Court has jurisdiction of her appeal is that the amount in dispute exceeds \$7,500, the fact that it has jurisdiction on that ground must affirmatively appear from the record made in the trial court; and if the petition does not allege any definite amount she is entitled to recover, either as alimony or attorney's fees, the entire record should be examined, to determine what is the amount in dispute.

4. ———: ———: ———: ———: **Inadequate Award: Social Station.**

Where the plaintiff in her petition in the divorce case did not allege the amount she was entitled to recover as alimony or attorney's fees and its prayer was that she be adjudged such alimony as in the nature of the case and the circumstances of the parties may be right and proper, and in her motion for a new trial she complained that the amount of alimony awarded her was inadequate and less than she was entitled to under the law and the evidence and further that she should have been adjudged an amount sufficient to yield her an income that would support her according to the station in life of herself and defendant, the amount in dispute on her appeal is the difference between the \$5,000 adjudged to her and either (a) the adequate amount to which she is entitled under the law and the evidence, or (b) an amount that would yield an income sufficient to support her according to her station in life; and unless it affirmatively appears from the entire record that the amount she was entitled to recover for one or the other of these reasons, is an amount in excess of \$12,500, the Supreme Court has no jurisdiction of her appeal—there being no other ground on which jurisdiction is invested in said court except the one possible ground that the amount in dispute exceeds \$7,500. But she could have fixed appellate jurisdiction in the Supreme Court, by claiming in her petition an amount in excess of \$7,500 over and above the amount awarded her by the trial court, unless the allegations made it apparent that such claim was fictitious and colorable only.

5. **DIVORCE: Dower After Decree for Wife.** The wife's inchoate dower in her husband's real estate is unaffected by a decree granting her alone a divorce and awarding her alimony in a named sum of money, which is not adjudged to be in lieu of dower.

6. **Estate by the Entirety: Cotenants Upon Divorce Decree.** Residence property, bought by the husband and by his bounty conveyed to him and his wife as tenants by the entirety, by virtue of a decree of divorce in her favor becomes the property of the two equally as tenants in common.

Appeal from St. Louis County Circuit Court.—*Hon. G. A. Wurdeman*, Judge.

TRANSFERRED TO ST. LOUIS COURT OF APPEALS.

*Homer Hall* for appellant.

*Muench, Walther & Muench* for respondent.

RAGLAND, C.—This action was begun April 3, 1914, in the Circuit Court for St. Louis County, by Alinda B. Vordick against August H. Vordick for divorce and alimony. Plaintiff and defendant were married September 11, 1913, and separated March 7, 1916. At the time of their marriage plaintiff was a widow, about fifty years of age, and resided at Troy, New York, where she had a married daughter living; the defendant was a widower, about sixty-five years of age, having also a married daughter, and resided in the City of St. Louis. They first met on a cruise through the Orient in the spring of 1912. On their return to their respective homes a correspondence ensued, resulting in their marriage. Soon after their marriage defendant purchased a home in an attractive residence district in University City, St. Louis County, paying therefor \$12,500. It contained eleven rooms and was a two and a half story structure. There they began housekeeping. They kept no servants, but plaintiff with some assistance from defendant did all of the housework, including the cooking, washing, ironing, etc. Except for recreation trips they lived there continuously until their separation. They spent four weeks in Michigan in July, 1914, and about two months in California in the summer of 1915. When they were at home she never went anywhere except to church and to meetings of certain of its auxiliary societies. Their brief life together was tempestuous from the beginning. From the first the defendant indulged in violent outbursts of temper, during which he applied offensive epithets to plain-

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tiff and not infrequently struck her. Immediately after these explosions the domestic atmosphere invariably cleared, the defendant asked forgiveness, which was apparently freely granted, and periods of unalloyed felicity followed. Defendant's violent exhibitions of passion were occasioned by his *jealousy*, produced no doubt by a disordered imagination, and as time went on they recurred with more frequency. At first the plaintiff was the passive recipient of his violence, later she defended herself with a right good will, and in the last encounter it cannot be said that she got the worst of it. While she carried a "black eye" for a week or more, his spectacles were broken, his "whole left side scratched up" and he was laid up in bed where he "suffered all night for two or three days." As a result of this pitched battle plaintiff left and went to a hotel, but, as fierce as it was, her affection for defendant, apparently, was not appreciably lessened thereby, for a day or two afterward she stole unobtrusively into their home and pinned a note to his pillow, containing this brief message, "I love you." On finding this he went in pursuit. An interview followed, at which she gently insinuated that he should settle on her some of his property as a peace offering. This he could not abide, and the breach became final.

The evidence most favorable to plaintiff's contention tends to show that at the time of the trial the defendant owned the following property: Notes and securities, bearing six per cent annual interest, to the amount of \$30,000; a forty-six acre tract of land two miles west of Clayton in St. Louis County, of the estimated value of \$38,800; a fifty-acre tract on the Bellefontaine Road north of the City of St. Louis, of the estimated value of \$12,500; and two lots in an outlying industrial district of the City of St. Louis, of a value estimated at from \$30,000 to \$40,000. All of this real estate was unimproved and the values put on it by witnesses were concededly speculative. Parts of one or more of the larger tracts were rented to gardeners and yielded an annual rental of from five hundred to six hundred dollars. The rents received from

the remainder were nominal. In addition to the property just mentioned, there was the residence which the defendant purchased for \$12,500, and which appellant in her brief tacitly admits he caused to be conveyed to her and himself jointly, thereby creating in them an estate by the entirety. The evidence also discloses inferentially that the plaintiff at the time of her marriage to defendant was, and at the time of the trial continued to be, possessed of some means, the extent of which, however, even approximately, is not suggested. The defendant was a physician, but had retired from active practice, only occasionally treating an old patient. His income from this source must have been meagre.

The petition as ground for divorce sets out with particularity indignities of the character hereinbefore indicated. It also alleges that the defendant is seized and possessed of real and personal property and money of the value of \$250,000 and that the plaintiff is without adequate means of support and for the prosecution of this suit. The prayer is for divorce and "that the court will adjudge to her such alimony, support and maintenance out of the property of the defendant as under the nature of the case and the circumstances of the parties may be right and proper." The answer admitted the marriage, denied the other allegations of the petition and set up counter indignities.

The court found the issues for plaintiff and that she was the innocent and injured party and granted her a divorce. It also adjudged that as and for alimony in gross she recover the sum of \$9,000, on the condition that within twenty days thereafter she relinquish her inchoate dower in defendant's real estate, and that failing so to do she recover the sum of \$5,000. She declined to relinquish her inchoate dower so that the judgment for alimony in gross is for the sum of \$5,000.

Plaintiff filed a motion for a new trial on the grounds, among others, that the alimony and attorney's fee are "wholly inadequate and much less than the plaintiff is entitled to under the law and the evidence," and that the judgment ought to be for an amount suf-

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sufficient to give plaintiff a net income which would provide for her support and maintenance in accordance with the station in life of plaintiff and defendant. The motion was overruled, and an appeal from the judgment awarding alimony and attorney's fees was granted to this court. Pending this appeal the defendant has died and the cause has been revived in the name of his executor.

The principal assignment of error is that "the court erred in awarding to plaintiff an inadequate and insufficient amount as alimony in gross and for attorney's fees."

It would be easier to dispose of this appeal on the merits than on a question of jurisdiction, but, as has often been said and it does not hurt to repeat it occasionally, under a constitutional government the acts of a court not within the powers prescribed by the organic law are usurpations; and when done by a court of last resort may become a grave menace. To determine our jurisdiction before proceeding is, therefore, at all times an imperative duty. Divorce *per se* is not one of the cases named in the Constitution in which an appeal lies to this court. If we have jurisdiction to determine this appeal on the merits, therefore, it is because that, notwithstanding it is for divorce, it has some attribute that brings it within the enumeration of the specific cases wherein we have appellate jurisdiction. From a view of the entire record, the only possible one is that the amount in dispute, exclusive of costs, exceeds seven thousand five hundred dollars. And if we have jurisdiction on that ground it must be because that fact affirmatively appears from the record made in the trial court. [Kitchell v. Railway Co., 146 Mo. 455-457; State ex rel. v. Gill, 107 Mo. 44, 49; State ex rel. v. Reynolds, 256 Mo. 710-717; Tobacco Co. v. Rombauer, 113 Mo. 435; Huntington v. Saunders, 163 U. S. 319.]

The petition does not allege any definite amount that plaintiff is entitled to recover either as alimony or attorney's fees. Its prayer is that the plaintiff be adjudged such alimony as under the nature of the case and

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the circumstances of the parties may be right and proper. The entire record, however, should be looked to in order to determine the amount in dispute; the petition is not conclusive in that respect. [Vanderberg v. Gas Co., 199 Mo. 455.] In the motion for a new trial plaintiff complains that the amount of alimony awarded to her is inadequate and less than she is entitled to under the law and the evidence, and further that she should have been allowed an amount sufficient to yield her an income that would support her according to the station in life of plaintiff and defendant. As the trial court awarded plaintiff \$5,000 alimony, the amount in dispute is the difference, if any, between that amount and, either the adequate amount to which plaintiff is entitled under the law and the evidence, or an amount that would yield her an income sufficient to support her according to her station in life. On the question of jurisdiction, therefore, it is for us to determine whether it *affirmatively* appears from the entire record, including the evidence, that, either the adequate allowance to which plaintiff is entitled under the law and the evidence, or an amount sufficient to yield her the income mentioned, is in excess of \$12,500.

An examination of the evidence discloses in a general way that at the time of the trial defendant was sixty-seven years of age, that he had passed the productive period of his life and that while his property was estimated, by those in sympathy with plaintiff's contention as to its value, at from \$110,000 to \$120,000, more than three-fourths of it consisted of unimproved non-income-producing real estate for which there was no market except a speculative one. The residence property for which defendant soon after the marriage paid \$12,500, being through his bounty held by plaintiff and defendant as tenants by the entirety, by virtue of the decree of divorce became the property of the two equally as tenants in common. Plaintiff's inchoate dower in the remainder of the real estate was wholly unaffected by the decree, and, by reason of his age, it could, at



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the time of the trial, have been reasonably anticipated that before the lapse of many years it would become consummate, as it in fact has since this appeal was taken. Of the remaining property, consisting of \$30,000 in notes and securities, \$12,500 is nearly half. Neither to the accumulation of this, nor to that of any of defendant's property, did plaintiff contribute in the slightest degree, either in money or labor, or in sacrifice or thought. Such contribution cannot, therefore, furnish a basis for giving her a moiety or any other definite part of his estate as it did in *Gercke v. Gercke*, 100 Mo. 237. However, she is entitled to have sufficient alimony to recompense her for the protection and support lost to her by defendant's breach of the marital obligation ending in the decree of divorce. From the facts in evidence it does not appear that the value in money of such protection and support necessarily exceeds \$12,500. Appellant suggests that a just recompense therefor would be an amount sufficient to furnish her an income that would support her according to her station in life. Let it be conceded. She did not lose her home by reason of the divorce, and the evidence does not show directly or by necessary inference that the income from the \$12,500 would not support her in that home, or in another obtained with the proceeds of the sale of her interest in it, according to the style and manner of living adopted by plaintiff and defendant during their marriage. Defendant's gross income out of which he supported himself and wife was approximately \$2400 a year. If, instead of awarding plaintiff alimony in gross, the court had required defendant to pay her annually during her life one-half of his income, or \$1200, the present value thereof, according to the Carlisle tables of mortality adopted by statute in this State for certain purposes, would be less than \$12,500. Upon any reasonable view of the evidence as a whole, it does not affirmatively appear that plaintiff is necessarily entitled to, or that she claimed in the court below, alimony in gross in excess of \$12,500. The evidence does not show the extent of plaintiff's

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means, and for that reason the adequacy or inadequacy of the allowance of \$500 to her for attorney's fees has not been considered in connection with the entire judgment for \$5500, of which it is a component part.

This case presents a striking instance of the difficulty often encountered in determining from the record the amount in dispute when jurisdictional. From the very nature of the controversy an examination of the evidence to determine the amount in dispute involves to some extent a consideration of the merits, and the conclusions reached of necessity include the holding that appellant on the facts in proof is not entitled to alimony in gross in excess of \$12,500. This difficulty would have been obviated had plaintiff made claim to some definite amount in her petition, or elsewhere of record, in the court below. The amount so claimed, if in excess of \$7,500, over and above the amount awarded by the court, would have fixed appellate jurisdiction in this court, unless it was apparent that such claim was fictitious or colorable merely, and in this case it probably would not have been so regarded. [Cherry v. Cherry, 150 Mo. App. 414, 167 S. W. 539; State v. Gill, *supra*; Tobacco Co. v. Rombauer, *supra*.]

As it does not affirmatively appear from the entire record that the amount in dispute, exclusive of costs, exceeds \$7,500, this court is without jurisdiction of the appeal. It is ordered that the cause be transferred to the St. Louis Court of Appeals.

*Brown and Small, CC., concur.*

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

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Ridings v. Hamilton Savings Bank.

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HARRY E. RIDINGS, Administrator De Bonis Non of Estate of T. D. GEORGE, ORA LEE RIDINGS, BERTHA GEORGE RENTSCHLER et al. v. HAMILTON SAVINGS BANK and VIRGIL CASH, Appellant.

Division One, March 2, 1920.

1. **CONVEYANCE: Interest and Not Land.** The granting clause of a deed of trust whereby the grantor doth "grant, bargain, sell, convey and confirm unto the said second party the following real estate: All of his right, title, share and estate in and to" certain lands, conveys whatever interest the grantor has, but not the land itself. The words "grant, bargain, sell, convey and confirm" do not purport to convey or warrant the land, or any particular interest therein, but only such right, title, interest or estate as the grantor has, whatever that interest may be.
2. ———: ———: **Administration: Innocent Purchaser.** A purchaser for value at the foreclosure sale of a deed of trust by which the grantor conveyed his interest in certain land, and not the land itself, made during the course of the administration of his father's estate to secure the payment of his individual debt, acquired whatever right, title and interest the grantor had, subject to all equities the other heirs had against his share or interest in said property. A purchaser at said foreclosure sale, though for value, is not an innocent purchaser, but similar to the grantee in a quit-claim deed, who takes with notice, actual or constructive, of the equities of third parties.
3. **ADMINISTRATION: Sale of Interest by Heir: Voluntary Conveyance by Other Heirs to Pay Debts.** The joining by non-indebted heirs of an estate in the course of administration, in a private sale and conveyance of other estate lands, to obtain money with which to pay debts primarily those of another heir, but allowed against decedent's estate, and the payment thereby of such debts, cannot be considered as a voluntary loaning by such heirs to such debtor heir or to the estate of the money to pay his or its debts, but are acts in their nature coercive, brought about by his delinquency, and neither he, nor another claiming his interest in another tract as purchaser at the foreclosure of a deed of trust made by him after decedent's death to pay his individual debts, can take advantage of a situation brought about by his wrong. An heir indebted

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to decedent's estate, by reason of decedent's suretyship for him or otherwise, has in equity against the other heirs no definite share or interest in the estate, unless he pays such indebtedness, and failing to do so his interest or share is cut down to the extent of his debts to the estate; and the purchaser at the foreclosure of a deed of trust, by which he conveys his interest in the remaining lands to secure the payment of an individual debt, takes subject to the right of the other heirs, who have conveyed estate lands to pay estate debts, to be reimbursed out of his original share in such lands.

4. ———: ———: ———: **Final Settlement: Estoppel.** Heirs who assist the administratrix to pay estate debts, whereby she is enabled to make final settlement and be discharged, are not estopped to compel contribution, to the extent of a debtor heir's interest in estate lands conveyed by him to pay his individual debts. The grantee in such conveyance is not an innocent purchaser, a final settlement only indicates that there are no unsatisfied estate creditors, and such assistance is not voluntary.
5. ———: **Administrator De Bonis Non: Partition.** In a suit for partition brought by heirs, whether or not the appointment of an administrator *de bonis non* was void or valid need not be determined, since he is not a necessary party.

Appeal from Caldwell Circuit Court.—*Hon. Arch B. Davis*, Judge.

**AFFIRMED.**

*Johnson, McAfee & W. W. Davis* for appellants;  
*J. D. Allen* on brief.

(1) The daughters having placed their brother in a position to convey his share or interest in the estate to innocent parties, the loss should fall upon the children, the heirs of the estate, they being the parties to the transaction who placed him in a position to impose upon innocent parties. *Chippen v. American Natl. Bank*, 51 Mo. App. 508; *Rossi v. Natl. Bank of Commerce*, 71 Mo. App. 161. (2) The payment by the daughters into the hands of the administratrix a sum sufficient to pay all demands against the estate, was voluntary upon their part, they having made said payment with full knowledge of all of  
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the facts and having done so without fraud, duress, coercion, or extortion; therefore, it cannot be recovered in this action. *Carter v. Phillips*, 49 Mo. App. 319; *Ritchie v. Bluff City Lumber Co.*, 86 Ark. (3) The approval of the final settlement and discharge of the administratrix was a final judgment, upon which the world might rely. *McDonald v. McDaniel*, 242 Mo. 172; *Milling & Elevator Co. v. Thomson*, 246 Mo. 595. (4) There is no showing in this case that Harry E. Ridings was the duly and legally appointed administrator *de bonis non* of the estate; therefore, the circuit court was without jurisdiction to determine the issues in this case. *State ex rel. v. Holtcamp*, 266 Mo. 365. (5) The payment of all debts against the estate, including the debts owing by T. D. George, Jr., with full knowledge of all of the other heirs, and no claim of said heirs, either of advancement or subrogation having been made in the probate court, and final settlement having been had and the administratrix discharged, created the simple relation of debtor and creditor between T. D. George, Jr., and other heirs, and any amount owing by him was not a lien on the distributive share, unless made so by judgment. *Wooldridge v. Scott*, 69 Mo. 669; *Price v. Courtney*, 87 Mo. 387.

*Bruce Barnett* for respondents.

(1) All of the items charged in and by the decree against the interest of Hamilton Savings Bank (the interest of Virgil Cash as trustee for said bank) as successor in title to defendant T. D. George, Jr., are properly chargeable. *Trabue v. Henderson*, 180 Mo. 625; *Woerner's Am. Law of Administration*, sec. 564; *Hopkins v. Thompson*, 73 Mo. App. 401. (2) The fact that the heirs at law sold real estate of the deceased and turned over the proceeds to the administratrix, who used same to pay debts allowed against the estate, upon which debts the son was primarily liable and the estate liable only secondarily, only illustrates, emphasizes and in this case strengthens respondents' position, namely, that out of

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the proceeds of that sale the son has already received a part of his share in the estate, to-wit, to the extent that it was applied to the payment of the debts, which it was his primary duty to pay. (3) As between the estate and the creditors, the estate was liable upon the notes executed by deceased as surety as fully as if deceased had been principal upon said notes. A payment for which one is legally liable is not voluntary, and it has never been held that a surety must wait to be sued and be subjected to costs and expense to be entitled to exoneration as against the principal. (4) It would be a tremendous leap from a little premise to a great conclusion to say that respondents sold the real estate of their deceased father's estate to discharge the son's liability. The transaction must be rationally construed, to-wit, that they were aiding in the administration of their father's estate and hastening the day when the remaining real estate of the estate might be free from the lien of demands against the estate. There was nothing voluntary in the act. Respondents simply yielded to the inevitable. Real estate of the deceased had to be sold to pay the debts of the estate, and a purchaser appearing, they lent a willing hand. (5) A purchaser of an heir's interest in real estate of which the ancestor had died seized, acquires no greater interest than that of the heir. (6) The appellant bank must be treated as having had knowledge of the facts as to the indebtedness of T. D. George, Jr., to the estate at the time the deed of trust was executed to the bank, because the bank did not allege, nor prove nor undertake to prove that it did not have such knowledge, and even if innocence or ignorance of the facts had constituted a defense to the allegations of respondents as to the charges against the bank's interest, the burden of proof would have been upon the one asserting innocence or ignorance of the facts as the basis of his rights. *Halsa v. Halsa*, 8 Mo. 304; *Edwards v. Railway Co.*, 82 Mo. 101. And this rule applies with particular force in this case, in which the bank did not pay out or give up anything upon the strength of the deed of trust, but took same to secure a debt long ante-

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cedent. *Brandom v. McCausland*, 171 Fed. 402 (C. C. A.); *Bradley v. Fuller*, 118 Mass. 239; *Austin v. Barrows*, 41 Conn. 287.

SMALL, C.—Appeal from the Circuit Court of Caldwell County.

This is a suit to partition certain lands amongst the heirs of T. D. George, Sr., deceased (two of whom are the married women named in the title to the case), and the defendants, Hamilton Savings Bank and Virgil Cash, who acquired the right, title and interest of T. D. George, Jr., the other heir.

T. D. George, Sr., the father, died intestate November 7, 1913. Ella George, his widow, was appointed administratrix November 15, 1913. She seems also to have been a party to this suit, but whether plaintiff or defendant, does not appear from the abstract of record. T. D. George, Jr., is also a party defendant. At the time of the father's death, the son owed him a promissory note, which was never paid, and, at the date of the decree, amounted to \$1,461.50. The father had also signed notes for his son as security and on joint account, all of which were duly presented, proved and allowed as claims against the estate, and amounted to \$8,389.43, which was paid by the administratrix. On September 3, 1915, T. D. George, Jr., and his wife, made a deed of trust to William H. McAfee, trustee, to secure the note of said George of that date to the defendant Savings Bank for \$4,965.26. This note was given in renewal of a prior note for that amount then due. The new note, secured by the deed of trust, was payable six months after its date. The granting clause of the deed of trust was, "grant, bargain and sell, convey and confirm unto the said party of the second part, the following described real estate, situate in the County of Caldwell in the State of Missouri: All of his undivided right, title, share and estate in and to the following described property, to-wit: [here describing it]."

The deed of trust contained no express covenants of warranty or of title. The note not being paid

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when due, there was a trustee's sale, at which the defendant, Cash, became the purchaser, as trustee for the bank. The granting clause in the trustee's deed was, "bargain, sell and convey unto him, the said Virgil V. Cash, the real estate in said deed described, situate in the County of Caldwell and State of Missouri, to-wit: All the undivided right, title, share and estate of the said T. D. George, and Hazel George, his wife, in and to the following described property, to-wit: [here describing the property]."

To raise the money to pay the debts of the estate (there being insufficient personal estate), including those proved against the estate, for which the son was the principal debtor and primarily liable, the heirs of the estate, including the son, sold and conveyed certain other lands of the estate and paid over the money received therefor to the administratrix, who applied the same to the payment of the demands proved against the estate, including those for which the son was primarily liable above mentioned. The administratrix having thus fully paid all the obligations of the estate, filed a final settlement, which was duly made, and approved by the probate court August 12, 1915, when the administratrix was discharged. In October, 1915, the plaintiff Harry E. Ridings was appointed administrator *de bonis non*.

This suit was then commenced, returnable to the November Term, 1915 (or afterwards) of said court. The petition prayed, among other things, that the above sums paid by the administratrix on account of debts of the son proved against the estate should be charged against and deducted from his share of the estate in the hands of the defendants, Hamilton Savings Bank and Virgil Cash.

The answer pleaded that administration was duly had upon said estate and all claims against it paid. That Ella George, the administratrix, made final settlement, which was approved and said administratrix was discharged. That no assets were discovered after said final settlement, and there were no unpaid demands against said estate. That therefore the appointment of



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plaintiff Harry E. Ridings as administrator *de bonis non* was void, and he had no capacity to sue. That said sale by the heirs of other lands of the estate to raise money to pay the debts of the estate and their payment by the administratrix out of such moneys, was a voluntary payment by them, and thereby said debts were fully discharged and paid, and if said T. D. George, Jr., was ever chargeable with any sum as advancements or as distributions already received by him, such obligation was discharged by such voluntary payment. The answer also alleged the making of the deed of trust to said bank by said T. D. George, Jr., and wife, and that he thereby conveyed to the trustee "all his undivided right, title and interest" in said property to secure its note against him, and that subsequently the deed of trust was foreclosed and the property bought by defendant Cash, at the trustee's sale.

The court decreed that plaintiffs Ora Lee Ridings and Bertha George Rentschler, out of the proceeds of the sale of the property in partition (which was ordered), should each first receive the sum of \$8,389.43, with interest, subject to the widow's claim of dower, before the defendants, the bank and Cash, received anything, and that if anything then remained of such proceeds, it should be equally divided between said plaintiffs and defendant Cash, as trustee for the bank.

There were other issues involved below, but they are not involved on this appeal.

From said decree, defendants, the bank and Cash, appealed to this court.

I. The deed of trust and trustee's deed simply purported to convey whatever interest T. D. George, Jr., had at the time the deed of trust was made, and not the land itself, nor any definite portion thereof, divided or undivided. While the deed of trust contained the statutory words, "grant bargain, sell, convey and confirm," they did not purport to convey or warrant the land itself or any particular interest therein, but only such right, title, interest or estate, as

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the said T. D. George, Jr., had, whatever that interest might be.

In *Stoepler v. Silverberg*, 220 Mo. l. c. 267, where the same statutory words were used in the same connection in a deed, this court said: "The instrument must be read and construed in the light of all its parts and when this is done, it is obvious that it does not attempt or purport to convey and warrant the lot itself, but only 'all such right, title and interest,' that Frederick Stoepler, at the date of the deed, had in and to said house and lot."

Even express covenants of warranty, not only do not enlarge, but are themselves restrained by the estate granted. [*Bogy v. Shoab*, 13 Mo. l. c. 380-1; *Hanrick v. Patrick*, 119 U. S. l. c. 175-6; *Blanchard v. Brooks*, 12 Pick. 47, opinion by SHAW, C. J.] Indeed, the answer, itself, in this case, expressly admits and alleges that in and by said deed of trust said T. D. George, Jr., "conveyed to William McAfee, trustee for defendant, Hamilton Savings Bank, all his undivided right, title and interest in and to" said real estate.

II. As the bank or Cash, as trustee for it, simply acquired what right, title and interest the son had, its title is subject to all equities the other heirs had against the share or interest of the son, T. D. George, Jr., in said property. [*Hope v. Blair*, 105 Mo. l. c. 95; *Mann v. Best*, 62 Mo. 491; *Schradski v. Albright*, 93 Mo. 42; *Campbell v. Gas. Co.*, 84 Mo. 352; *Starr v. Bartz*, 219 Mo. 47.]

**Innocent  
Purchaser.**

It is true the bank was a purchaser for value, because it extended the payment of the debt owing it by said T. D. George, Jr., at the time said deed of trust was made. [*Smith v. Richardson*, 77 Mo. App. 431; and cases cited; *Gate City National Bank v. Elliott*, 181 S. W. l. c. 28; *Cass County v. Oldham*, 75 Mo. 50.]

But, it is not sufficient to shut out equities of third parties that the purchaser of real estate be a purchaser for value, he must also be a bona-fide purchaser, that

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is, a purchaser without notice, actual or constructive, of the equities of such third persons, which he cannot be when he simply takes a quit-claim deed, or deed simply conveying the grantor's interest (authorities first above cited). Appellants therefore were not innocent purchasers and they can claim no immunity or defense on that ground, as against the equities, if any, of the said Cora Lee Ridings and Bertha George Rentschler.

III. It is said, however, by appellants, that Mrs. Ridings and Mrs. Rentschler, in joining with their brother in selling other lands to pay off the debts of the estate, thereby, in effect, voluntarily loaned their brother or the estate the money to pay his debts to the estate. Therefore the brother was entitled to his full share of the land, and his sisters' claim against him was that of a general creditor, without any lien or charge or set-off of any kind against his undivided share of the remaining real estate. We cannot consent to this view. The sisters were forced to either consent to a sale of the land and join in it to raise the money to pay off the debts allowed against the estate, including those for which the brother was primarily liable, and the estate liable only as surety for him, or it would have been necessary for the administratrix to sell such land or other lands for that purpose under an order of sale of the probate court. They acted under a sort of duress brought about by their brother's delinquency, and neither he, nor the Bank claiming his interest, could take advantage of a situation brought about by his own wrong.

Trabue v. Henderson, 180 Mo. 616, is a case in point. There the son owed the estate a sum practically equal to the value of his share. There was no administration, but all the heirs, including the son, conveyed the land to their mother. As a part of the same transaction, they joined their mother in a power of attorney to one of the sisters, authorizing her to manage the property and pay off the debts. This was done to avoid the expense of administration. The sister took posses-

Voluntary  
Sale of Other  
Lands.

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sion and operated the farm for several years so successfully that she paid off the debts of the estate, including the son's debts for which the estate was liable. Another creditor of the son obtained judgment against him, sold out his interest in the land conveyed to his mother, and bought it in at the sheriff's sale. He then brought suit to set aside the deed to the mother, as fraudulent and void as to creditors, because she paid no consideration to the son. But this court held that the deed to the mother was good, not only as against the son, but as against his creditors, because at the time the deed was made the son's share was subject to application in the regular course of administration to the payment of his obligations to the estate, and for the debts for which his father went his security, and the estate was liable; that such obligations amounted to the full value of the son's share when he conveyed to the mother, therefore the creditors lost nothing, because in the regular course of administration, nothing would have been coming to the son. The court said, page 626: "That is, in neither event would the plaintiff [the creditor] get anything. And the plaintiff would get nothing, because John [the son] would get nothing. And John would get nothing because he was entitled to nothing, *for the reason that he owed the estate more than his inheritance amounted to.*" (The italics are ours.)

In *Hopkins v. Thompson*, 73 Mo. App. 401, the court, per SMITH, J., elaborately reviews the authorities, and it is there clearly shown that a debt of an heir to the ancestor reduces his share by the amount of such debt, and the other heirs not indebted (page 409), "are entitled to have the sum due from one who is so indebted collected from him, or, failing in this, they have a right to share in the assets as if such collection had been made and the debtor distributee share in the estate only upon the like assumption of payment by him. So that if his debt is equal to or greater than the value of one share in the distributable estate, . . . he is never entitled to anything from the estate. . . . It cannot be doubted that this right of the administrator in behalf of the heirs

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*and of such heirs themselves* to set off the distributive interest of the debtor heir in the lands of the ancestor, or to subject such interest to the payment of the debt of the estate as against third persons claiming as judgment creditors of the heir, is of equitable cognizance.' '' (The italics are ours.)

In other words, an heir indebted to the ancestor's estate by reason of the ancestor's suretyship for him or otherwise has in equity as against the other heirs no definite share or interest in the ancestor's estate, unless he pays such indebtedness, and failing to do so, his interest or share as heir is cut down to the extent of the sum he owes the ancestor's estate. If there is no difference, or his indebtedness exceeds the value of what would otherwise have been his share, his interest or share is nothing. Having nothing, he can convey nothing to others, or if anything remains, after deducting his indebtedness, he could convey what remains, but nothing more. So that the bank in this case by its deed of trust from T. D. George, Jr., and its purchase thereunder, could get nothing except one-third of what remained, if anything, after giving each of the two other heirs, as was done in this case, as much out of the estate, as he had already received by the payment of his debts. Having received his share or part of it once, neither he nor his grantee, the bank, is entitled to receive it again. In holding that the bank took subject to the equities of the other heirs, because it took a deed from the son conveying simply his estate and interest, whatever that was, we do not mean to hold that, if it had taken a warranty deed for "an undivided one-third interest" from him, as a bona-fide purchaser for value, the result would have been any different. We do not pass on that question, as it is not before us.

IV. It is also said by appellants that, because the sisters assisted the administratrix in raising the money, as they did, to pay the debts of the estate, whereby the administratrix was enabled to make a final settlement

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**Estoppel.** showing all the debts paid, the bank was deceived and led to believe the son's share was clear of all claims of the other heirs, and they ought now to be estopped, under the rule that where one of two innocent parties must suffer, the one to suffer should be the one whose conduct caused the loss. We do not agree to this, for several reasons: 1st, The bank was not an innocent party or purchaser, as we have already seen; 2nd, The fact that the estate appeared to be settled and all debts paid, indicated only that there were no unsatisfied creditors of the estate who might appropriate the land for their claims. It in no way related to or indicated anything as to the rights of the heirs against each other at law or equity; 3rd, The conduct of the sisters complained of was not voluntary, as we have already determined, but forced upon them to protect their own interests and that of the estate, and cannot therefore be said to be the culpable cause of the bank loaning its money to or taking its deed of trust from the brother. We must rule this point, too, against the appellants.

V. Whether or not the appointment of Harry E. Ridings, as administrator *de bonis non*, was void or valid, we need not determine, because he was not a necessary party to this suit. The real parties in interest were before the court, and all matters could be adjudicated without his presence.

**Administrator  
De Bonis Non.**

The judgment of the lower court appealed from was without error. It is therefore affirmed. *Brown* and *Ragland*, CC., concur.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

## HOME INSURANCE COMPANY, Appellant, v. C. L. WICKHAM.

Division One, March 2, 1920. .

1. **ADMINISTRATION: Presentation of Claims: Limitations: Exhibition to Administrator Within Six Months.** Section 195, Laws 1911, page 82, does not mean that the exhibition of a demand against the estate to the administrator for allowance within six months will alone stop the running of the special statute of limitations. A claimant cannot avail himself of the fact that he exhibited his demand, by notice and in due time, to the administrator, unless he also presents it to the court for allowance within the time prescribed by the statute.
2. ———: ———: ———: ———: **Presentation to Court.** The Legislature did not intend by the amendatory Act of 1911, by striking out of Section 195 the words explicitly requiring demands to be presented to the court for allowance and substituting the words explicitly requiring it to be exhibited to the administrator for allowance, to make the section simply a reiteration of the requirement of Section 191, as amended, that a demand must be exhibited against the estate as provided in clauses five and six of Section 190, as amended, or be forever barred, but did intend to require a second exhibition to the administrator, the first being for the purpose of obtaining priority of classification, and the second for the purpose of having it allowed. Said Section 195, as amended, requires a demand to be presented to the court for allowance. At all times prior to 1911 and since 1855 two kinds of limitation sections have run along side by side in the Administration Statute, each serving different purposes and each indispensable and distinct from the other, the one requiring demands to be exhibited to the administrator within a designated period, and the other requiring them to be presented to the court for allowance within a designated time.
3. ———: ———: **Exhibition to Administrator for Allowance.** The words "for allowance," used in Section 195 of the Administration Act of 1911, requiring the claimant to "exhibit his demand to the administrator in the manner provided by law, for allowance," are not positive enough to empower the administrator to allow a demand against an estate, or to imply that such power already existed. Demands must be established by the judgment of a court, and the requirement that a demand be exhibited to the administrator

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for allowance means an exhibition to him in a proceeding in court to have the claim allowed.

4. ———: ———: **Manner of Exhibiting Demand.** Exhibition of a demand to the administrator for allowance means an exhibition to him in a proceeding in court, and this proceeding can be by an action in court in the ordinary mode, or by presentation to the probate court. If the exhibition is by presentation to the probate court, the proceeding is initiated in the manner provided by the statutes, namely, by the claimant delivering to the administrator, ten days in advance of the term at which he intends to present the claim, a written notice and copy of the instrument of writing or account on which the claim is founded, with a statement that it will be presented for allowance at the next regular or adjourned term.
5. ———: ———: **Dismissal: Reinstated Within a Year.** Where the demand was exhibited to the administrator within six months after letters granted, and presented to the probate court more than six months after the last publication of notice, and then dismissed, a suit brought in the circuit court within one year after such dismissal, but more than one year after letters granted, or the last published notice, is barred by limitations, under the Act of 1911. The special limitation statute contained in said act controls, and the provision in the general limitation statute that a new action may be begun within one year after such dismissal does not apply. The exhibition of the demand to the administrator within six months does not stop the running of the special statute (Sec. 195, Laws 1911, p. 82) requiring the demand to be presented to the court for allowance "within one year after the granting of first letters on the estate, or the last insertion of the publication of notice of the grant of such letters."
6. ———: ———: **Inconsistencies in Section 195; Exception.** The second part of Section 195 of the Administration Act of 1911, permitting exhibition of a demand to the administrator at the usual term for final settlement, seems inconsistent with the first clause, which requires claims to be exhibited within a year from the granting of letters, since final settlement can occur no sooner than "the first regular term of the court after the expiration of one year." But said second part may be regarded as contemplating an exception to the regular procedure, and to allow a proceeding, commenced with the year, to be followed up in court as late as the term next succeeding the one at which final settlement would otherwise occur. The purpose was to permit a claimant whose second exhibition was within the year, but too late to follow it up in court within the year, to have a term, but only one, after the one for final settlement, to present it to the court; whereas a claimant who gave earlier notice under Section 203 would need no



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such grace. This ambiguity in Section 195, however, was cured by the amendment of 1917, Laws 1917, page 98.

**CONSTRUCTION OF STATUTE: Reconciling Inconsistencies.** In order to prevent one statute, or a portion of one, from conflicting with the entire scope of legislative action touching the subject, it is sometimes necessary to depart from a literal construction, and adopt the one that removes the inconsistency and produces harmony.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker, Judge.*

**AFFIRMED.**

*Fyke & Snider*, for appellant.

The circuit court erred in holding that the claim was barred by the one-year Statute of Limitations. Laws 1911, p. 82; *Knisely v. Leathe*, 256 Mo. 341.

*McKay & Smith*, for respondent.

GOODE, J. —This is an action against the defendant as administrator *de bonis non* of the estate of J. A. Wickham, deceased, and is to recover on a promissory note for one hundred and four dollars, payable in four instalments, all of which, under the terms of the instrument, were due when the action was commenced. The note was given by J. A. Wickham and L. C. Wickham, apparently for premiums on a policy of insurance issued by appellant. J. A. Wickham died September 9, 1911, and Lucy C. Wickham was appointed, by the probate court of Dunklin County, administratrix of his estate, received letters testamentary bearing date September 19, 1911, and published notice of them, the last insertion of the notice being October 13, 1911. On April 4, 1912, or a little more than six months after their date, plaintiff exhibited to the administratrix the note as a demand against the estate, and notified her the demand would be presented to the probate court for allowance at the

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next term, which would be in April. On April 15th of the same year, the demand was presented to the probate court and, both parties being present, a trial took place which resulted in an allowance by the court of four dollars on the demand. An appeal was prosecuted to the Circuit Court of Dunklin County, where the cause was dismissed July 29, 1912. Lucy C. Wickham having died, respondent was appointed administrator *de bonis non*, and on September 28, 1912, this action was begun in the Circuit Court of Dunklin County on the same demand. The defendant was served, appeared, and for defense to the demand pleaded a general denial and also the special administration Statute of Limitation, alleging the suit was filed and service was had on the defendant more than one year after the grant of letters of administration. The cause was appealed to the Springfield Court of Appeals and was there decided, two of the judges agreeing, but on different views of the relevant statutes, that the demand was not barred by the special statute as shortened to one year by an amendment adopted in 1911 and hereafter copied; from which conclusion of the majority of the court one of the judges dissented and caused the case to be certified here as being in conflict with the decision of this court in *Wernse v. McPike*, 100 Mo. 476.

The only question for decision is whether the claim was barred by limitation when this action was begun, defendant asserting it was, for the reason stated in his answer, whereas plaintiff contends that, as the demand was exhibited to the administratrix April 4, 1912, and was presented to the probate court for allowance April 15, 1912, both of which proceedings occurred within seven months of the grant of letters, therefore the demand could not be barred except by the general statute limiting the time for beginning actions on written obligations for the payment of money. Otherwise stated, plaintiff's position is that under the amendments of 1911, the statute of the administration law, prescribing the period which will bar the allowance of demands against estates, no longer ran against plaintiff's demand after it had been exhibited to

the administratrix; or, if that is not true, the running of said limitation statute ceased upon the presentation for allowance on April 15th, notwithstanding the proceeding was dismissed later.

In 1911 ten amendments of the administration law were enacted, all approved on March 13th of said year. The purpose, either declared or apparent, of seven of those amendments was to shorten the time wherein certain proceedings in the course of administration might be taken (for examples, filing inventories and publishing notice of the grant of letters), with the view thereby to expedite the winding up of estates and enable them to be settled within a minimum period of one year, instead of two as theretofore provided. [Laws 1911, pp. 78 to 86 inclusive.] We will state such of the changes made, as throw light on the question before us. Section 82, Revised Statutes 1909, regarding the publication of letters, was amended to require the notice to state that if claims were not exhibited "within one year [instead of two] from the date of the last insertion of such publication, they shall be forever barred." [Laws 1911, p. 79.] That is one enactment limiting the time for exhibiting demands. Section 190, Revised Statutes, which defines the several classes of demands against estates and fixes priority of payment among them, was amended as to the fifth and sixth classes, by placing in the fifth class demands not exhibited within six months (previously a year) after the granting of first letters, and in the sixth class those not exhibited in one year after (previously two). [Laws 1911, p. 80.] Section 191, Revised Statutes 1909, which is especially intended to limit the time for exhibiting claims to executors and administrators for classification, was modified to require them to be exhibited in one year instead of two.

"That Section 191, of Article 7 of Chapter 2 of the Revised Statutes of Missouri of 1909, be, and the same is hereby repealed and a new section enacted in lieu thereof, to be known as Section 191, and to read as follows: Section 191. All demands not thus exhibited in

one year shall be forever barred, saving to infants, persons of unsound mind or imprisoned, and married women, one year after the removal of their disability, and said one year shall begin to run from the date of the letters where notice shall be published within ten days, after letters are granted, and in all other cases said one year shall begin to run from the date of the last insertion of the publication of the notice."

Section 238 was amended to allow final settlement to be made "at the first regular term of the probate court *after the expiration of one year from the completion of publication of notice of letters.*" Italics ours.) [Laws 1911, pp. 83, 84.] The amended section mainly involved in the present case is 195, but the provisions of it can be understood best if we copy the three sections not altered in 1911, immediately preceding it, which prescribe how claims shall be exhibited to the executor or administrator.

"All actions pending against any person at the time of his death, which, by law, survive against the executor or administrator, shall be considered demands legally exhibited against his estate from the time such action shall be revived, and classed accordingly." [R. S. 1909, sec. 192.]

"All actions commenced against such executor or administrator, after death of the deceased, shall be considered demands legally exhibited against such estate from the time of serving the original process on such executor or administrator." [R. S. 1909, sec. 193.]

"Any person may exhibit his demands against such estate by serving upon the executor or administrator a notice, in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded; and such claim shall be considered legally exhibited from the time of serving such notice, or a waiver of such notice, in writing, by the executor or administrator." [R. S. 1909, sec. 194.]

Next we quote Section 195, showing in parentheses the words in the section prior to the amendment for which others were substituted, and emphasizing the words in the amendment not before contained in the section.

“No claimant shall avail himself of the benefit of the preceding section unless he shall exhibit (present) his demand to the administrator (court) in the manner provided by law, for allowance, within one (two) year after the granting of first letters on the estate, or the last insertion of the publication of notice of the grant of such letters as provided for in Section 191 of this article, *nor unless he shall also present his said demand to the court at the term thereof next succeeding the term during which he shall have exhibited the same, whenever the same is exhibited during the term at which final settlement could be made except for the exhibition of such demand.*” [Laws 1911, p. 82.]

It should be noted that said section relates solely to a demand exhibited according to the mode provided in Section 194, as amended in 1911.

Plaintiff's first contention is, as stated above, that as Section 195, after its amendment, no longer required a demand to be presented to the court for allowance in order to stop the running of the special statute, nothing was required to stop it except an exhibition to the executor or administrator, which in plaintiff's case was made on April 4, 1912, and thereafter it could only be barred by the general statute of limitations. The claim of plaintiff was exhibited on that day in the mode authorized by Section 194; that is, by serving the administratrix with a notice in writing, showing the amount and nature of the claim, and with a copy of the note. Section 195 (as amended) says no claimant shall avail himself of the preceding section, “unless he shall exhibit his demand to the administrator in the manner provided by law, for allowance, within one year after the granting of the first letters,” etc. Did the Legislature intend, by striking out of said section the words explicitly requiring a demand to be *presented to the*

court for allowance and substituting words explicitly requiring it to be *exhibited* to the *administrator*, to make the section simply a reiteration of the requirement of Section 191, as amended, that a demand must be exhibited "against the estate" as provided in clauses five and six of Section 190, as amended, or be forever barred? Or was it rather the intention to require a second exhibition to the administrator, the first being, as we have suggested, for the purpose of placing the demand in a certain class as regards priority of payment, the second for the purpose of having it allowed?

Subsequent to the 1855 Revision of the Statutes and until 1911, a section substantially the same as 195, of the present 1909 Revision, had stood on the books; namely, one requiring a demand to be presented to the court for allowance within a given period after letters were granted or published, the period being three years until 1879, and two years thereafter. [R. S. 1855, sec. 6, p. 153; G. S. 1865, sec. 6, p. 502; R. S. 1879, sec. 189; R. S. 1889, sec. 188; R. S. 1899, sec. 185.] There also has been continuously since 1855, a section like 191 of the present revision, requiring claims to be exhibited against the estate within a stated period or they would be barred. [R. S. 1855, sec. 2, p. 152; G. S. 1865, sec. 2, p. 502; R. S. 1879, sec. 186; R. S. 1889, sec. 184; R. S. 1899, sec. 189.] The years of limitation stated in the two classes of sections have been the same, except in the Revision of 1865, which gave two years for the exhibition of a demand and three for presenting it to the court. In the Revision of 1889, the words "and presented to the court for allowance" were inserted in the sixth clause of Section 183, which dealt with the classification of demands, and Section 184, which limited the time for their exhibition, *thereby making said clauses in themselves, and regardless of Section 185, bar demands unless exhibited and presented to the court within two years*; the quoted words not having been contained in those particular sections theretofore, nor later; and they appear to be unnecessary, because in that Revision and subsequent ones, the section cited above

was retained for the specific purpose of requiring presentation to the court within two years. But the material point at present is that the two kinds of limitation sections existed side by side after 1855, and always have been held to serve two different purposes, each indispensable and distinct from the other; one being to require demands to be exhibited to executors and administrators, the other to require them to be presented to a court for allowance; both acts to be done within a designated period, the two periods usually being identical. [Price v. McCause, 30 Mo. App. 627; Savings Bank v. Burgin, 73 Mo. App. 108, 114; Keys v. Keys, 217 Mo. 48, 65.]

It seems that now and then the attention of a judge has been fixed so exclusively upon the words "presented to the court for allowance," in Sections 183 and 184 of the Revised Statutes 1889, as to evoke *dicta* that the omission of said words in later revisions dispensed with the necessity of presenting a demand to the court within two years, in order to suspend the special Statute of Limitations; an erroneous notion in view of the express requirement of Section 188 in the Statutes of 1889, and its equivalent in later Revisions. Such remarks have been made, we believe, in no case where the question in judgment called for them. In Ryans v. Boogher, 169 Mo. 673, 684, the statement was made that "at the time of the attempted final settlement there was no special Statute of Limitation in this State which barred a claim which had been legally exhibited against an estate because it had not been presented to the court for allowance," a remark followed by the statement that an act passed in 1899 (Laws 1899, p. 39) had struck out of Section 185 of that Revision the words "*and presented to the court for allowance.*" But the claim contested in said case had been exhibited, *not by serving notice on the administrator, but by bringing an action in the circuit court*, a mode of exhibiting then and now authorized. [R. S. 1899, sec. 187; R. S. 1909, sec. 193.] A demand so exhibited is patently not subject, either in principle or by the language of the

law, to the provision that no claimant shall avail himself of the exhibition of a demand, to toll the statute, unless he shall present it to the court for allowance within two years. This section, by its very words, refers to the preceding section, for it says "no claimant shall avail himself of the preceding section," etc. The preceding section is the one which provides, not for exhibiting demands by an action in court, but for exhibiting them by serving notice in writing on the executor or administrator. [R. S. 1899, sec. 188; R. S. 1909, sec. 195.] In *Ryans v. Boogher*, cited above, GANTT, J., who wrote the opinion, explained what he meant to say in the passage we have quoted, by immediately saying: "Section 189, Revised Statutes 1899, cited by defendants, by its terms is restricted to the demands referred to in Section 188, and has no application whatever to suits commenced and prosecuted under Section 187, the section under which plaintiff prosecuted his suit." Obviously and independently of the express reference to the preceding section, the one requiring presentation to the court could have no application to a demand exhibited by an action in court, for such an exhibition is also, in itself, presentation for allowance; the exhibition and the presentation occurring at the same time, if one act is within two years, the other is.

In *Knisely v. Leathe*, a case controlled by the Statutes of 1909, the demand was exhibited to the executrix by the institution of a suit September 7, 1907, or within six months of the date of letters, their date being March 20, 1907. The action was dismissed, but on March 10, 1909, a second action was brought, which was ten days prior to the expiration of two years from the date of the letters. Therefore the demand was both exhibited and presented to the court for allowance within the statutory period; and whatever was said to the effect that merely exhibiting a demand tolls the special statute permanently, was not essential to the decision and seems to have been written in forgetfulness of the statute which declares a claimant shall not avail himself of the fact that he exhibited by notice and in due time to the executor or administrator,



unless he presents it for allowance within two years. [R. S. 1909, sec. 195.]

So much for cases wherein *dicta* have occurred tending to the conclusion that the exhibition of the demand for classification is enough to prevent the special statute from running, except where there are words in the classification section, or the one dealing with the limitation of time to exhibit, like those contained in the Revision of 1889, requiring a presentation to the court.

But there have been discussions of this question where it was necessary to decide it to dispose of the case; and perhaps the most thorough treatment of it was by THOMPSON, J., of the St. Louis Court of Appeals, in *Price v. McCause*, supra. The opinion says something more is required of a claimant to save the bar of the statute than an exhibition of a demand to the executor or administrator; that to hold otherwise would be to excise from the statute the section providing, in effect, that no claimant should avail himself of an exhibition to an executor or administrator unless he shall present his demand to the court for allowance within two years from the granting of the first letters. [R. S. 1889, sec. 189.] Further saying: "If the holder of a claim against the estate of a decedent can save the bar of the statute by exhibiting it to executor or administrator within the statutory period, without presenting it to the probate court for allowance and classification before the expiration of such period, he can defeat the policy of the statute entirely and keep the estate open indefinitely. If, having exhibited it to the executor or administrator in time, he creates a *lis pendens* which stops the running of the statute, as counsel for the claimant would argue, so that he can come into court with it a year after expiration of the statutory period, he can come into court with it at the point came up for decision. [*Farmers Sav. Bank v. That exposition of the law has been approved wherever indefinite time afterwards—at least so long as the estate remains open. This, we think, would be opposed to the letter and policy of the statute.*" [30 Mo. App. l. c. 632.]

Burgin, 73 Mo. App. 108, 113; Keys v. Keys, 217 Mo. 48, 65.]

The policy of legislation for so many years having been to exact, in order to suspend the running of the special limitation, something besides the exhibition of a claim to an executor or administrator in order to fix the time of its payment out of the estate's assets, it is improbable that the Legislature, in amending Section 195 of the present statutes to provide for exhibition to the administrator for *allowance*, meant only to reiterate the necessity of the exhibition within a year for classification under Sections 190 and 191. To so hold would be to attribute to the Legislature the intention to dispense with presentation to a court within any time short of the general limitation period; which would be a radical change from the prior policy of the law and, moreover, would frustrate the declared purpose of most of the amendments of 1911 to shorten the period wherein final settlement can be made. Besides, if no more than the original exhibition to the executor or administrator was to be required, why retain, instead of omit, Section 195, when Section 191 would fully accomplish the purpose intended? Why, too, use the words "for allowance," in connection with the required exhibition to the administrator; words not used in the preceding sections (190, 191), but instead the words "exhibited against the estate?"

We consider the deduction a fair one from the particulars noted, that the first part of Section 195, as amended, was intended to prescribe a second proceeding to be taken by a claimant to prevent his claim from being barred by the one-year limitation. What is that proceeding? Providing for exhibiting to the administrator "for allowance" might be deemed to imply that an administrator was empowered to allow a demand against an estate; but it is clear the words used are not positive enough to show an intention either to confer such a power, or to imply that it already existed. Demands must be established by the judgment of a court. [R. S. 1909, secs. 197, 198, 206; Langston v. Canterbury, 173 Mo. 122.] The require-

ment of an exhibition to the administrator for allowance within the year, to be an effective act and not merely a useless ceremony, must mean an exhibition to him *in a proceeding to have the claim allowed*. This proceeding could be by an action in court in the ordinary mode (Sec. 197), or by presentation to the probate court (R. S. 1909, secs. 198, 206); and in the latter event the proceeding would be initiated in the manner provided by the statutes; namely, by the claimant delivering to the executor or administrator, ten days in advance of the term at which he intended to present the claim, a written notice and copy of the instrument of writing or account on which the claim was founded, with the statement that it would be presented for allowance at the next regular or adjourned term. [R. S. 1909, secs. 203, 204, 205.]

Plaintiff asserts there was a second exhibition to the administrator when the demand was presented to the probate court, April 15, 1912, to have it allowed—the proceeding subsequently dismissed. That exhibition, though not followed up to a judgment, would have sufficed for the purpose of classification, had the one of April 4th been omitted; but we think did not suffice to stop the special statute. Otherwise a second exhibition, not intended to be followed by proceedings necessary to put the demand into judgment, would be a compliance with the statutory requirement of presentation for allowance; and the claimant having done this much, might wait as long as he pleased, short of the period fixed by the general statutes of limitations, before taking proper and bona-fide measures to establish his claim. The rule generally prevailing in this country is that if an action is begun and afterwards dismissed, the statute of limitation runs against the cause of action from the time it accrued except where time for another action is given, as is done by our statutes in allowing a year wherein to sue again after a nonsuit, etc. (R. S. 1909, sec. 1900), a grace extended by construction in favor of dismissed cases. [Wetmore v. Crouch, 188 Mo. 647.] This saving clause is not available where the limitation period is prescribed by a special

statute, not included in Articles 8 and 9 of the chapter on Limitations of Actions; hence does not bar upon this case. [R. S. 1909, sec. 1907; Gerren v. Railroad Co., 60 Mo. 405, 409; Clark v. Railroad Co., 219 Mo. 524, 530; State ex rel. v. Thompson, 81 Mo. App. 549, 558; State ex rel. v. Hawkins, 103 Mo. App. 251.] In view of the general doctrine that upon the dismissal of a case a limitation statute runs against the cause of action from its accrual, we hold the abortive steps to have plaintiff's demand allowed were not such a proceeding as suspended permanently the running of the special statute. We think the point in decision in Knisely v. Leathe, *supra*, accords with this ruling, even though some remarks in the opinion might be interpreted the other way. [256 Mo. 341, 362.] We hold further that the second exhibition to the administrator for allowance, includes not merely serving him with notice and a copy of the demand in accordance with Sections 203 and 204 (R. S. 1909), but carrying the proceeding forward by presenting the demand to the court according to the notification, or at furtherest, within the year; subject, however, to the exception made in the latter part of the amendment of 1911, to be noticed presently. No less can be accepted as an effectual compliance with the requirement of an exhibition *for allowance*, without defeating the whole policy of the administration law, to have the claims allowed only by a court, and the whole policy of the amendments of 1911 to expedite final settlements. The second part of the amended section, though apparently inconsistent with the first part in some respects, throws light on the latter by plainly requiring the second exhibition to be followed up, in the instance contemplated by said second part, by presentment to the court; for it provides this shall be done in the event the claimant exhibits to the administrator "during the term at which final settlement could be made except for the exhibition." It is unreasonable to suppose presentment to the court was intended to be required solely under those circumstances, and that claimants exhibiting earlier should be under no necessity to

proceed in court at all sooner than was necessary to prevent the bar of the general limitation statutes. The latter clause of Section 195, as amended, needs no attention in the present case, except in so far as the sense of the first clause is indicated by it; for this action was begun September 28, 1912, and plaintiff's claim was thereby exhibited a second time within the meaning of the amendment, and at a term prior to the one when final settlement could be made. The terms of the probate courts are the second Mondays in February, May, August and November (R. S. 1909, sec. 4060), so final settlement for the Wickham estate could not come before the November term, 1912, the date of the last insertion of the notice of letters having been October 13, 1911.

The second part of the act in permitting exhibition at the usual term for final settlement, seems inconsistent with the first clause, which requires claims to be exhibited within a year from the granting of first letters, or the last insertion of notice thereof unless notice is published in ten days from their date. Final settlement in every case can occur no sooner than "the first regular term of the court after the *expiration of one year* from the date of the publication of the notice of letters," and after notice of the intended settlement has been published for four weeks. [R. S. 1909, sec. 238, as amended; Laws 1911, p. 84.] Let it be borne in mind that the exhibition to the administrator required by amended Section 195, must be by a proceeding carried through to a judicial allowance of the claim. Let it also be borne in mind that such a proceeding may be begun not only by an action in court under Section 197, R. S. 1909, but also under Section 203 and 204, by notice in writing to the administrator that the demand will be presented at the next regular or adjourned term, with copy of the instrument or account, etc., which notice must be served ten days before the beginning of the term. Now it could happen that, in the latter mode of presentment, the notice to initiate the proceeding might be served within the year after grant of letters (or the last publication of notice thereof if said notice was not published

within ten days of their date), but too late to continue the proceeding thus begun by presentation in court at a term within the year, or even at the next term thereafter. For example, the year following the grant of letters might expire the Saturday before the second Monday in November, and if notice was served on the administrator that day, ten days would not elapse before the next term began; in fact only two days would elapse. In such a case the amendment appears to contemplate an exception to the regular procedure, and to allow the proceeding in the exhibition to have the claim allowed, which proceeding has been commenced within the year, to be followed up in court as late as the term next succeeding the one at which otherwise final settlement could occur. The words "when-ever the same is exhibited *during* the term at which final settlement could be made except for the exhibition of such demand," regard the proceeding as a continuing one, and notice having been served within the year of an intention to present at the next regular or adjourned term, the exhibition is treated as occurring during the term; and if the next term happens to be the one for final settlement, the succeeding term is allowed for presentment. We think the purpose was to prevent a claimant whose second exhibition was within the year, but too late to follow it up in court within the year, to have a term, but only one, after the one for final settlement, to present to the court; whereas a claimant who gave earlier notice under Section 203 would need no such grace. This construction renders it possible to postpone slightly the winding up of estates beyond the period contemplated by amended Section 238 and other amendments of 1911; but it is the construction which comes nearest to carrying out the sole purpose of most of the amendments and is, therefore, to be adopted if the language of the act will permit. A court must give effect to an act of the Legislature if it is possible to do so consistently with the language of the act. [State ex inf. v. West Side Ry. Co., 146 Mo. 155, 168.] And in order to prevent one statute, or a portion of one, from conflicting with the entire scope of legisla-

tive action touching the subject, it is sometimes necessary to depart from a literal construction of the inconsistent enactment. [State to use v. Heman, 70 Mo. 441.] To attain this end, "the construction that produces the greatest harmony and the least inconsistency ought to prevail." [Pollock, C. B. in Atty. Gen. v. Sillem, 2 H. & C. 517.] "It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other." [Taylor v. Goodwin, L. R. 4 Q. B. Div. 228.] To conclude the Legislature meant to require a claimant late in exhibiting, to present for allowance at the next term after what is normally the one to settle the estate and to allow earlier exhibitors to delay presentment to any date short of the bar of the general limitation law, thus greatly extending instead of contracting the administration period, is too extreme a view to accept, unless driven to it by the language of the act, and we think we are not. If the Act of 1911 is treated as void because of conflicting clauses, the two-year statute for presentment will be revived and the entire scheme of the amendatory acts disarranged. In our opinion the language of Section 195, as amended, may be interpreted in accordance with what we have said, without either perverting, restricting or unduly broadening the natural meaning of the words used.

The ambiguity of this section (195) was cured by amendment in 1917. [Laws 1917, p. 98.]

The result is that the judgment of the Springfield Court of Appeals reversing and remanding the cause is set aside, and the judgment of the circuit court is affirmed. All concur.

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Kleine v. Kleine.

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JOHN KLEINE et ux., Appellants, v. MARY L.  
KLEINE.

Division One, March 2, 1920.

1. **DESCRIPTION: Starting Point: Parallelogram Presumed.** A lease which describes a tract in the City of St. Louis and State of Missouri as "one hundred feet running westward on Coal Bank Road, beginning at private road fronting house, and seventy feet running northward on private road, beginning at Coal Bank Road," fixes the starting point at the intersection of Coal Bank Road and the private road, and that being definite, a parallelogram, one hundred by seventy feet, will be presumed; and a definite tract extending one hundred feet westward, from the intersection of the two roads, along the north side of Coal Bank Road, and seventy feet northward along the west line of the private road, was described.
2. ———: ———: ———: **Extrinsic Evidence.** Extrinsic evidence is always admissible to explain the calls in a deed and for making certain any ambiguity in the description. If a surveyor can take the deed and from its descriptions locate with certainty the definite tract intended to be conveyed, the description is sufficient.
3. **SIGNING DEED: With Lead Pencil.** A deed or lease is not invalid because signed by lead pencil, instead of pen and ink.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings*, Judge.

**AFFIRMED.**

*John W. Mueller* for appellants.

(1) If the description of real estate contained in an instrument, which seeks to convey an interest in said real estate, is so inaccurate, indefinite and incomplete as to render the identity of the particular tract of land sought to be conveyed wholly uncertain, the instrument is void as a means of conveying interest in real estate or color of title. *Mudd v. Dillon*, 166 Mo. 410; *Martin v. Kitchen*, 195 Mo. 477; *McCormack v. Parson*, 195 Mo. 91; *Schroeder v. Turpin*, 253 Mo. 258; *Campbell v. Johnson*, 44 Mo. 247; *Bell v. Dawson*, 32 Mo. 79; *Schumacher v. McMonigle*, 86 Ind. 421; *Hoodless v. Jernigan*, 46 Fla. 223; *Youman v. Moore*, 144 Ga. 375; *Harvey v. Byrnes*, 177 Mass. 518; *Brandon v. Laddy*, 67 Cal. 43;



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Radford v. Edwards, 88 N. C. 347; Hanna v. Palmer, 194 Ill. 41. (2) If the description of property sought to be conveyed by a written instrument does not fix the boundaries or shape of land sought to be conveyed so that by relying on the description contained therein, the form and indentify, of the premises could not be ascertained, the instrument is void and inoperative as a means of conveyance of title. Schumacher v. McMonigle, 86 Ind. 421; Harvey v. Byrnes, 177 Mass. 518. (3) A patent ambiguity in an instrument is an uncertainty that arises at once upon the reading of the instrument and arises from the defective, obscure, senseless or indefinite language used. 3 Bouvier, p. 2536; Jones on Evidence, sec. 474; Harvey v. Wirtz, 30 N. D. 304; Martin v. Kitchen, 195 Mo. 477; Mudd v. Dillon, 166 Mo. 110; Strong v. Waters, 50 N. Y. S. 257. (4) When a mere perusal of the instrument in question reveals an uncertainty as to the indentify of the premises sought to be conveyed and reveals that the description of the premises conveyed as contained in the instrument is given in a defective, obscure and senseless manner, or by defective, obscure or senseless language, a patent ambiguity exists in said instrument which cannot be corrected, explained or added to by extrinsic testimony. Mudd v. Dillon, 166 Mo. 110; Martin v. Kitchen, 195 Mo. 477; Carter v. Holman, 60 Mo. 498. (5) An instrument required under the Statute of Frauds to be in writing cannot rest partly on parol and partly on the writing, but must contain in the writing all the elements necessary to the validity of the instrument. Broom's Maxims, p. 463; Norris v. Hunt, 51 Tex. 609; Ringer v. Holtzclaw, 112 Mo. 523.

*Igoe & Carroll and Frederick H. Eschmann for respondent.*

(1) The object of a description in a deed is to define what the parties intended. Long v. Wagoner, 47 Mo. 180. (2) Intention of parties, whether expressed or shown by surrounding circumstances, is all-controlling. McClure v. Herring, 70 Mo. 18; Johnson v. Boulware,

149 Mo. 451; Devlin on Deeds, secs. 835-836, and sec. 1012; 8 R. C. L. 1037; Evans v. Greene, 21 Mo. 195; 5 Cyc. 867; Truett v. Allen, 66 Cal. 818. (3) A deed will not be declared void for uncertainty if it is possible by any reasonable rules or construction to ascertain from description, aided by extrinsic evidence, what property is intended to be conveyed. Hubbard v. Whitehead, 221 Mo. 672; Tetheron v. Anderson, 63 Mo. 98; Cravens v. Petit, 16 Mo. 213; Dunn v. English, N. J. L. 126. (4) Statute of Frauds does not apply where contract has been fully performed. Hoyle v. Bush, 14 Mo. App. 408; Bollinger County v. McDowell, 99 Mo. 636; Reemer v. Nessmith, 34 Cal. 624; Devlin on Deeds, sec. 1012; 17 Cyc. 662; Hooten v. Comerford, 152 Mass. 591; Reed v. Proprietor, 8 How. 274. (5) The description in deed is sufficient if object covered is ascertainable with the aid of extrinsic evidence. Amount v. Montague, 63 Mo. 206; Livingston County v. Morris, 71 Mo. 605; Orr v. How, 55 Mo. 329; Brown v. Walker, 226 Mo. 235; Cox v. Hart, 145 U. S. 389; Blake v. Dougherty, 5 Wheat. 1359; Gales v. Paul, 94 N. W. 55. (6) The office or purpose of a description in a deed is to furnish the means of identification. Pipkin v. Allen, 29 Mo. 229; Blake v. Dougherty, 5 Wheat. 1359; Craven v. Butterfield, 80 Ind. 503. (7) A description in a deed is sufficient if it will enable a person of ordinary prudence acting in good faith and making inquiries, which the description would suggest to him, to identify the land—if a surveyor with deed before him, with or without aid of extrinsic evidence, can locate land and establish the boundaries. Haves v. Martin, 134 Ala. 532; Door v. School Dist., 40 Ark. 237; Devlin on Deeds, sec. 1012. (8) Streets and highways are natural monuments. 5 Cyc. 869, B. (9) A parallelogram will be presumed to have been intended when a definite and fixed corner is located. Smith v. Nelson, 110 Mo. 552; Deal v. Cooper, 94 Mo. 62; Devlin on Deeds, pp. 1922 to 1931; 5 Cyc. 877. (10) In the interpretation of deeds *inter partes*, courts are not inclined to insist upon that accuracy of description required in sheriffs' deeds or other transfers of property. Carter v. Holman, 60 Mo. 498.

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Kleine v. Kleine.

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GRAVES, J.—Action to quiet title. The petition is in conventional form under the statute. By answer the defendant says that she has a lease for a period of twenty years on a portion of the tract of land described in the petition of plaintiffs; that plaintiff John Kleine marked off the lot 100 by 70 feet, and that she built a five-room cottage thereon, and fenced it, and took possession of it; that the said John Kleine assisted her in the building of the house and fences; that thereafter she paid rent for two years.

Reply was a general denial. Trial before the court resulted in a judgment for plaintiffs as to the title being in them, but the further judgment that defendant had a valid lease for 20 years upon the tract 100 by 70 feet. From such judgment plaintiffs have appealed.

John Kleine and the defendant are brother and sister. In 1913 John Kleine told his sister that she could have a lease upon a small tract (100 by 70) of his land on Coal Bank Road in the City of St. Louis. He pointed out to her the boundaries. At her own cost and expense she built a five-room cottage thereon, and fenced the land, and took possession of it. In 1915, after much urging, she got John Kleine and wife to execute the following lease:

"This lease made and entered into by and between John and Rose Kleine, hereafter referred to as lessor, and Mary L. Kleine, hereafter referred to as lessee.

"Said lessor for and in consideration of a rent of five dollars to be paid yearly by said lessee, does hereby lease unto said lessee the following described premises situated in the City of St. Louis, State of Missouri: One hundred feet running westward on Coal Bank Road, beginning at private road fronting house, and 70 feet running northward on private road beginning at Coal Bank Road.

"This lease begins June 15, 1913, expires June 15, 1933. Lessee has the right to remove at any time improvements made by lessee.

"During the time of lease said lessee has the privilege of a moderate use of water.

"Said lessee promises to sell improvements made on premises for a reasonable price at any time when lessor sells the land.

"MARY L. KLEINE,  
JNO. J. KLEINE,  
ROSA KLEINE."

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For two years he accepted the money for the rent, but thereafter he declined rent. Conceiving the lease invalid he and his wife brought this action. Kleine's testimony in the case tends to leave a bad taste in the judicial mouth. Among other things he requested that the lease be signed with a lead pencil, and says that he "figured" that it was no good when he signed it, "because there was no starting point." All this was after the sister had put her money into the improvements. Further details will be left to the opinion.

I. It is clear that the idea of John Kleine, as to there being no starting point mentioned in the lease, is without foundation. The lease says: "one hundred feet running westward on Coal Bank Road, beginning  
**Description.** at private road fronting house, and 70 feet running northward on private road beginning at Coal Bank Road." From this it is clear that the starting point is the intersection of Coal Bank Road and the private road. From this intersection, or starting point, the tract was to be 100 feet on Coal Bank Road, and 70 feet on the private road, from the intersection of the two. In other words, the description in the lease gives a starting point, and two sides of the lot. Having a fixed corner and the two sides given, a parallelogram will be presumed. In other words we have the width and depth of the tract given, and only have to extend the lines to get a parallelogram.

In *Smith v. Nelson*, 110 Mo. 552, we have a description calling for one acre in the corner of a government surveyed tract. There we had only the starting point. We held that an acre in a square form would be presumed from such a description. So in this case having the starting point and two sides given we will presume the parties had in mind a parallelogram. See, also, 2 *Devlin on Deeds*, p. 1922. We have no doubt about the fact that this lease calls for parallelogram 100 by 70 feet, with the long side of the parallelogram on Coal Bank Road. The idea of there being no common starting

point for the respective sides of the parallelogram is not borne out by the lease itself. Whether the description fails for other reasons, we will discuss later.

II. The real issue in the case is not the views expressed by John Kleine, to the effect that he signed the lease (in lead pencil, at his own suggestion) because he thought it invalid, owing to the absence of a starting point. He seems not only to have had that idea, but the other erroneous view, entertained by many laymen, that a deed cannot be signed with a lead pencil, but must be signed with pen and ink. After his sister had expended her money on a five-room cottage and fences upon ground which he pointed out to her, it required two years to get him to sign a lease. When he did sign it he thought he had it in shape to beat the sister. And all this after he had accepted the rent for the first two years. What WAGNER, J., said in *Tetherow v. Anderson*, 63 Mo. l. c. 98, is peculiarly applicable to John Kleine. That learned jurist thus spoke:

“The only ground urged for a reversal is, that the description was so uncertain and indefinite that nothing passed by the plaintiff’s deed. This claim surely comes with a bad grace from the plaintiff, who acknowledges that he sold and conveyed the land by that description.”

The appellant Kleine not only went upon the ground and marked out the lot upon which the sister was going to build her little home, but he assisted her agents in the building of the cottage and fences, accepted the agreed rent for two years, and finally executed the lease in writing, after telling his sister to make it as short as possible. There is no question that the house is there facing the private road mentioned. There is no question that there is and was a private road. There is no question that Coal Bank Road is and was a public highway in the City of St. Louis, and State of Missouri. There is no question that the plaintiffs owned a tract of land (some eight acres more or less) on this public road, and that the lease was intended to cover a part of this tract. A surveyor testified that he could and did take the deed, and from its terms located the lot leased, after finding

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out the property on Coal Bank Road owned by the plaintiffs. In other words once given their property on Coal Bank Road, the tract claimed by defendant could be located by the description given in the lease.

The real issue is, whether the description taken as a whole, aided by such extrinsic evidence as may be used in construing the ambiguous terms of the contract, is sufficient to locate the land described in this lease? Thus in *Hubbard v. Whitehead*, 221 Mo. l. c. 683, GANTT, P. J., said: "Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter and thus give effect to the deed. While it is true that a deed must so describe land sought to be conveyed thereby that it can be identified, that is certain which can be rendered certain, and in construing a doubtful description in a grant the court will put itself in the position of the contracting parties as near as possible and consider the circumstances of the transaction between them and then read and interpret the words used in the light of these circumstances."

The proof *aliunde* in this case located the lands of plaintiffs on Coal Bank Road; it located the private road; it located the lot pointed out by John Kleine to his sister; it located the cottage in actual existence when the lease was written; it located the defendant in possession with the knowledge and consent of plaintiffs. With this information the surveyor said he could and did locate the leased ground.

Under the rule in *Hubbard's case*, *supra*, the judgment *nisi* is right and should be affirmed. It is so ordered. All concur, *Blair, P. J.*, in result.

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Kuhn v. Lusk.

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PAUL KUHN v. JAMES W. LUSK, Receiver of ST.  
LOUIS & SAN FRANCISCO RAILROAD COM-  
PANY, Appellant.

Division One, March 2, 1920.

1. **DANGEROUS MACHINERY: Duty to Guard When Statute Does Not Apply.** Independently of the statute and at common law, if ordinary care requires that dangerous machinery be guarded in order to render the place in which the servant is directed to work reasonably safe, then the master is liable for injuries to the servant resulting from a failure to exercise such care.
2. ———: ———: **Ordinary Care.** In Missouri the master incurs liability for failure to guard dangerous machinery where ordinary care for the safety of his servants requires it to be guarded, and that duty remains, although the statute requiring dangerous machinery to be guarded has no application to the situation.
3. ———: ———: ———: **Assumption of Risks.** The rule in Missouri is that the servant does not assume a risk that grows out of his master's negligence, however obvious or plain, but only assumes the peril incident to the service remaining after the master has exercised ordinary care; and in the exercise of ordinary care, in all occupations attended with great and unusual danger, the master is required to provide all appliances readily attainable and known to science for the prevention of accidents; and where the facts demonstrate that the master had in operation a machine about which he required his servant to work, that the danger was strikingly apparent, that at a trifling expense a guard or cover around such machine could have been maintained, which would in no wise have lessened its efficiency, and that if the guard had been maintained the danger to the servant would have been wholly removed, ordinary care required the master to provide the guard.
4. **NEGLIGENCE: Not Supported by Evidence.** Specific defects in a machine, charged in the petition to be a cause of plaintiff's injury, which are not established by any substantial evidence, should not by the instructions be submitted to the jury as a basis for plaintiff's right to recover.
5. ———: ———: **Recovery on Different Specifications.** If the jury are by the instructions permitted to find for plaintiff on either of two specifications of negligence, and as to one of them the evidence is insufficient to support a finding, a verdict and judgment for him must be set aside and the cause retried.
6. ———: **Obvious Danger: Question for Jury.** Plaintiff testified that he knew and fully appreciated the danger attendant upon cleaning the boxing next to the revolving cog-wheel, but as the gears fed upward he thought he could reach over the axle and

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wipe the grease from the under side without his coat sleeve being drawn into the cogs. *Held*, that, whether the danger of so doing was so great that an ordinarily careful and prudent man would not have attempted it was a question for the jury.

Appeal from Barton Circuit Court.—*Hon. B. G. Thurman*, Judge

REVERSED AND REMANDED.

*W. F. Evans and Mann, Todd & Mann* for appellant.

(1) At common law the master is not required to guard his machinery but could leave all parts of the machinery unguarded and incur no legal liability on that account. *Cole v. Lead Co.*, 240 Mo. 404; *Czernicke v. Ehrlick*, 212 Mo. 386; *Lore v. Manufacturing Co.*, 160 Mo. 608; *Blair v. Heibel*, 103 Mo. App. 621; *Gleason v. Smith*, 172 Mass. 50. (2) The respondent cannot avail himself in this action of the benefits of the statute regarding guards for dangerous machinery, to-wit, Sec. 7828, R. S. 1909: (a) Because the petition neither counts on the statute or brings the case within the terms thereof, but simply counts on the negligence of the appellant, "in failing to exercise ordinary care to furnish plaintiff a reasonably safe place to work, in that defendant failed to exercise ordinary care to properly house or shield the gearing or cogwheels to said motor." There is no allegation in the petition in the language of the statute or otherwise that the gearing was so placed as to be dangerous to persons employed thereabout while engaged in their ordinary duties, or that it was possible to guard it so as to prevent the injury. R. S. 1909, sec. 7828. (b) Because respondent, as his petition clearly indicates, founded his action in this regard upon the failure of the appellant to furnish him a reasonably safe place to work, in that it failed to house or shield the gearing. Respondent further introduced his testimony upon this theory over the objection of appellant and in drafting his instructions respondent relied solely on the common law liability and did not instruct under any theory covered by the statute. Respondent is bound by the theory upon which he not only brought but tried his case and submitted it to the



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jury. *Degonia v. Railway*, 224 Mo. 588; *Brunswick v. Insurance Co.*, 213 S. W. 46; *Hoff v. Transit Co.*, 213 Mo. 470; *Bray v. Seligman*, 75 Mo. 40; *Williams v. Loban*, 206 Mo. 407; *St. Louis v. Right*, 210 Mo. 502; *Brick Co. v. Railway*, 213 Mo. 727; *Williams v. Railroad*, 233 Mo. 676; *Lalapie v. Saddlery Co.*, 193 Mo. 13. (c) Because the appellant herein is the receiver of a railroad company and the provisions of Art. 6, Chap. 67, R. S. 1909, of which said Section 7828 is a part, was not intended to effect or govern railroads, and if undertaken to be so construed as to apply to railroads then said section as well as that article is unconstitutional, as has already been so declared by this court. *Williams v. Railroad*, 233 Mo. 666; Mo. Constitution, Art. 4, Sec. 28. (3) Instructions number 1 and number 2 are erroneous. They submit two grounds of negligence which the jury might consider in determining the question of defendant's liability. There is no evidence in the record that the boxings and babbitt bearings were old, defective and loosened, and if there were testimony that they were old, defective and loosened or if the wheels did not mesh true with each other so that when said machinery was in motion there was a lateral or wobbling movement of the gearing and a vibration of the frame of the motor and bearing of the shafting, then there is no evidence in the record that any of these things directly or in any manner caused plaintiff's sleeve to get caught in the gear or that they contributed in any way to his injury. The mere fact that such alleged condition of the bearings and gear existed did not entitle respondent to recover. In order that he should recover, his evidence must prove or tend to prove that these conditions were the proximate cause of his injury. In other words, except for the existence of these alleged defects his sleeve would not have been caught and he would have received no injury. *Trigg v. Lumber Co.*, 187 Mo. 234; *Doerr v. Brewing Assn.*, 176 Mo. 556; *Thompson v. Railroad*, 140 Mo. 135; *Stepp v. Railroad*, 85 Mo. 233; *Stanley v. Railroad*, 114 Mo. 624; *Henry v. Railroad*, 76 Mo. 293; *Jackson v. Elevator Co.*, 209 Mo. 506; *Go-*

ransson v. Mfg. Co., 16 Mo. 307; McGee v. Railroad, 214 Mo. 543.

*Sizer & Gardner* for respondent.

(1) This action is not bottomed on our statute requiring dangerous machinery to be housed. Sec. 7828. Since the enactment of that statute in 1891, a statutory duty exists upon manufacturer to house all machinery covered by this statute, and a failure to do so is negligence *per se*. This statute has been held not to apply to railroads; whether rightly so or not, we do not say. Williams v. Railroad, 233 Mo. 666. But in the absence of such statute, a duty exists by the master towards his servant, and this is what has been designated his common-law duty. The statute covers only such machinery as is mentioned by it, while the common law covers all machinery the same as it covers any other appliance furnished by the master. Machinery as an appliance of the master, finds no exception at common law, for the same rule applies to it that applies to tools and other appliances. The loose statements by our courts do not change the common law or modify its strictness in the least, and the common law obtains in all its completeness today, notwithstanding such expression by our courts. We do not contend that there is such duty as is imposed by the statute at common law, but only the duty to use ordinary care. If machinery is dangerous and the exercise of ordinary care requires it to be housed in order to make it, or the place, reasonably safe, then the master is as in duty bound to house it at common law as he is by statute; and a failure to house under such circumstances is negligence equally as culpable as a violation of the statute. Czernicke v. Ehrlick, 212 Mo. 386. This duty of the master at common law is horn-book law, and is elementary. Letanovsky v. Shoe Co., 157 Mo. App. 120; Quinn v. Electric Laundry Co., 155 Cal. 500, 17 Ann. Cas. 1100; Skelton v. Lumber Co., 140 Cal. 511; Buchel v. Gray, 115 Cal. 421; Carlin v. Kennedy, 94 Minn. 141; Greenan v. Eggeling, 30 Pa. Sup. Ct. 253; Cargill v. Towell Sup.

Co., 185 Pa. St. 269; Bartholemew v. Kemmerer, 21 Pa. St. 277; Flynn v. Prince Co., 198 Mass. 224, 17 L. R. A. (N. S.) 568; Kirwan v. Lithographic Co., 197 N. Y. 413, 27 L. R. A. (N. S.) 972; Wilson v. Williamantic Linen Co., 50 Conn. 533, 74 Am. Rep. 653; Hustis v. Bannister Co., 63 N. J. L. 465, affirmed 64 N. J. L. 279; Pierce v. Conterville Mfg. Co., 25 R. I. 512; Galveston Oil Co. v. Thompson, 76 Tex. 235; Podvin v. Pepperell Mfg. Co., 104 Me. 561, 129 Am. St. Rep. 411; Rooney v. Sewell Co., 161 Mass. 153; Connelly v. Hamilton Woolen Co., 163 Mass. 156; Lewis v. Simpson, 3 Wash. 541; Swoboda v. Ward, 40 Mich. 420; Strickland v. Capitol City Mills, 74 S. C. 16, 7 L. R. A. (N. S.) 426; Brooks v. De Soto Oil Co., 100 Miss. 849, Ann. Cas. 1914A. 656; Homestake Mining Co. v. Fullerton, 69 Fed. 923, 36 U. S. App. 32, 16 C. C. A. 545; Rabe v. Consolidated Ice Co., 91 Fed. 457; Paducah Box Co. v. Parker, 143 Ky. 607; 43 L. R. A. (N. S.) 179; Dettring v. Levy, 114 Md. 273; 4 Thompson on Negligence, sec. 4017; 18 R. C. L. p. 591, sec. 94; Duntley v. Inman, 42 Ore. 334; Westman v. Wind River Lbr. Co., 50 Ore. 137; Reichla v. Gruensfelder, 52 Mo. App. 58; Lemser v. Mfg. Co., 107 Mo. App. 219; Lightner v. Dunham, 195 S. W. 1055; Curtis v. McNair, 173 Mo. 284. (2) Defendant contends that the court erred in submitting to the jury defendant's negligence in failing to exercise ordinary care to keep his machinery in repair, that the boxings and babbitt bearings were old and defective and loosened and the wheels would not mesh true, so there was a wobbling or lateral movement of the gears. This necessitates a reference to the testimony in this regard. These instructions taken together well defined to the jury that issue of negligence. The court enumerated all the defects the jury must find to authorize a recovery, and defendant finds no fault therewith, except he states that there is no evidence in the records that the boxings and babbitt bearings were old, defective and loosened. He finds no fault with the charge that the gears did not mesh true, or that when said machinery was in motion there was a lateral motion of the gears and

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a vibration of the frame and bearings of the motor. He thereby tacitly concedes the sufficiency of the evidence to submit these facts. In other words, defendant claims that the jury were required to find all these facts when, in fact, plaintiff was entitled to recover upon proof of defects in the gears and the wobbling of the wheels and vibration of the frame. Defendant then, practically concedes that all the grounds which he now says were necessary to a recovery, were contained in this instruction and supported by evidence; but he makes complaint that plaintiff assumed the burden of proving more facts than were necessary to a recovery.

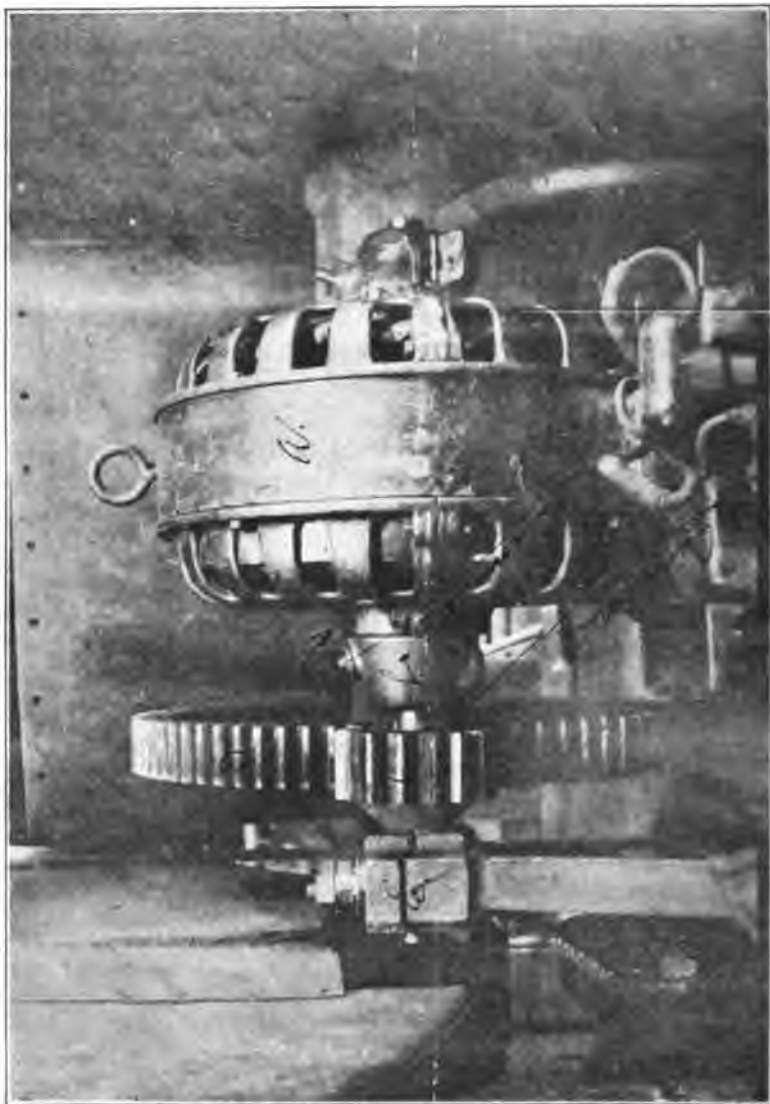
RAGLAND, C.—This is an action for personal injury caused, as it is alleged, by the negligence of defendant. Plaintiff recovered judgment for \$10,000, and the defendant appeals.

At the time of his injury, plaintiff was employed by defendant as a "handy man" and laborer in one of the machine shops of the St. Louis & San Francisco Railroad Company, of which defendant is receiver, located at the City of Springfield. As an incident to such employment plaintiff was required to clean and wipe the dust and grease off of a certain electric motor and the shafting through which the power was transmitted from it to a large punching machine. This motor was completely enclosed in a housing and was supported by a metal frame bolted to the concrete floor on which it rested. It faced south, and projecting from the center of it in that direction there was a shaft that revolved as the motor did. On this shaft, and so attached that it revolved with it, there was a cogwheel six inches in diameter. This small cogwheel at a distance of about eight inches from the motor cover meshed with a larger one, twenty-six inches in diameter, on a shaft immediately connected with the punching machine, and thus by the means of these cogwheels or gears and their respective shafts the power was communicated from the motor to the machine. The accompanying cut is from a photograph of the motor and gears intro-

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duced in evidence on the trial below. A great deal was said by the witnesses as to the locations of the boxing and bearings on the shafts or axles on which are the two cogwheels. As one of the specifications of negligence has for its basis the alleged defective condition of these boxing and bearings, the evidence in respect to their several locations is important, yet as the witnesses when testifying on the subject had photographs before them and merely said, for example, "There is a boxing," or "Here is a bearing (indicating)," without the record in any way disclosing what the witnesses indicated, the whole of their testimony as to such locations is obscure, and some of it conveys no meaning at all. However, the photograph shows that the axle on which is the small cogwheel extends from its support south of the wheel north through the frame work of the motor. It appears to be enclosed within boxing at the north end where it projects through the motor, and also between the frame and the cogwheel and between the wheel and its support at the south end. It evidently has two bearings in the motor frame and one where it is supported at the south end. The shaft revolved by the large cogwheel is parallel with the one on which is the small one, about sixteen inches west of the latter, similarly boxed and has its bearings on the same supports. The boxing and bearings of these shafts, it is said, were lined with babbitt. The bottom of the large cogwheel was about three inches and the two shafts about sixteen inches from the floor. The top of the motor housing seems to have been about the same distance from the floor as the top of the large cogwheel, about two and a half feet. When the motor and gears were in operation the small cogwheel made approximately 1200 revolutions a minute and the large one in proportion. The cogs were two and a fourth inches wide and revolved upward. The motor and gears were enclosed by shields or other barriers on the north, west and south sides, so that they could be approached from the east side only. None of the employees of the defendant had any occasion to be near or about them,

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except those whose duties required them to inspect, repair, oil or clean them. At the time the machine was originally installed there was a housing or cover that so enclosed both cogwheels that it would have been impossible for any one working on or about it to have come in contact with the cogs. This cover was furnished by the manufacturer as a part of the machine and for a time was so maintained by the defendant. It did not in any way interfere with the practical operation of the machine; notwithstanding, without any apparent reason, it had been removed and its use discontinued for a considerable length of time prior to plaintiff's injury.

At the time of his injury plaintiff was forty years of age and in the possession of all his faculties. He was a general utility man in the defendant's shops where he helped the machinists, looked after the belts and cleaned the motors and machinery. He had been so engaged in a general way during the preceding nine years and consequently was entirely familiar with the operations of shafts, belts and motors and the dangers incident thereto. He had been cleaning the motor in question for about two years. The motor proper was cleaned by blowing the dust and dirt out with compressed air conveyed through the nozzle of a hose applied at the openings in the motor cover. The dust and grease that accumulated on the motor frame and boxing around the shafts was wiped off with a piece of waste. It seems that in connection with one of the grease cups, grease would accumulate on the lower side of the boxing around the shaft of the small cogwheel between it and the motor. This grease would harden and become gummy so that it required considerable pressure of the hand to remove it with the waste. It was while attempting to clean the boxing at this place that plaintiff was hurt. In so doing he got into a stooping or squatting position at the northeast corner of the motor frame, took hold of the ring at the top of the motor cover with his right hand, and with his left, in which he held a piece of waste, he

reached over and back under the shaft of the small cogwheel and began to wipe the grease off of the bottom side of the boxing, when the sleeve of his jacket fed into the cogs and his forearm was drawn up through them and thrown out ground into pulp.

Plaintiff had been required to clean this motor once a week. Prior to about eleven months before he was hurt he had never cleaned it while it was running. At that time a new foreman was put in charge and he directed plaintiff, according to the latter's testimony, to clean the motor while it was running so as not to interfere with the work of the men, as it took about fifteen minutes for the machine to come to a stop after the power was shut off. Thereafter when the motor was to be cleaned, if the punching machine seemed to be idle, although kept constantly running, plaintiff requested the operator to shut off the power, which the latter always did; if the machine was engaged, he proceeded to clean the motor while it and the gears were in motion. He had cleaned it while in motion four or five times before he was hurt. The foreman emphatically denied that he had directed plaintiff to clean the motor while it was running. Other facts necessary to an understanding of the legal questions involved will be stated in connection with their consideration.

The allegations of the petition with respect to the negligence charged are as follows:

"Plaintiff states that his injuries aforesaid were directly caused by the negligence of the defendants, their agents, servants and employees:

"In failing to exercise ordinary care to furnish plaintiff a reasonably safe place to work, in that defendants failed to exercise ordinary care to properly house or shield the gearing and cogwheels to said motor.

"In negligently and carelessly ordering plaintiff to wipe and clean said motor while the same was in operation, instead of permitting plaintiff to clean same after said motor was stopped.



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"In failing to exercise ordinary care to keep said machinery in reasonably safe repair, so that same would not be dangerous for plaintiff to work in and about said motor; in that the boxing and babbitt bearings were old, and defective, and were loosened, and the small gear wheel did not mesh true with the larger gear wheel, so that when the machinery was in motion, the lateral movement of the gears and the vibration of the frame of the motor and the bearings on the shafting caused the sleeve on plaintiff's arm to feed into and become caught in the gears thereof.

"In failing to exercise ordinary care to maintain and keep said machinery in reasonably safe condition; and in abandoning the hood and shield which had previously been furnished and fitted to said gearing to protect employees working in and about said dangerous machinery..

"Plaintiff further states that by reason of the different acts of negligence, as aforesaid, acting separately or conjointly, plaintiff was injured as aforesaid, to his damage in the sum of twenty-five thousand dollars."

The answer is a general denial and a plea of contributory negligence.

At plaintiff's request the court instructed the jury with reference to defendant's negligence as follows:

"The court instructs the jury that in determining whether or not the defendant, his agents or employees was negligent as required by the first instruction, you should only consider the following grounds of negligence alleged by plaintiff in his petition, to-wit:

"1st. In failing to exercise ordinary care to furnish plaintiff a reasonably safe place to work, in that defendant failed to properly house or shield the gearing and cogwheels to said motor.

"2nd. In failing to exercise ordinary care to keep said machinery in reasonable safe repair, in that the boxings and babbitt bearings were old and defective and loosened, and the wheels would not mesh true with each other, so that when said machinery was in motion there

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was a lateral or wobbling movement of the gears and a vibration of the frame of the motor and bearing of the shafting; . . . and if you find that either one or both of such acts of negligence, if any acting separately or conjointly, directly caused injury to plaintiff and that plaintiff was in the exercise of ordinary care for his own safety, then your verdict will be for the plaintiff under this and the preceding instruction."

For the defendant the court fully instructed the jury as to the facts which, if found by them, would convict plaintiff of contributory negligence. At the close of plaintiff's case and again at the close of all the evidence, the defendant requested the court to direct a verdict in his favor.

Appellant assigns as error the refusal of his demurrers and the giving of plaintiff's principal instruction on the grounds: (1) That the first specification on which the case was sent to the jury did not under the law constitute actionable negligence; (2) that the evidence was not sufficient to take the case to the jury on the second specification; and (3) that plaintiff's negligence was the proximate cause of his injury as a matter of law. Under the view we entertain as to the controlling questions in the case, it will not be necessary to consider other points that are raised.

I. Appellant and respondent seem to agree that, as the alleged acts of omission on the part of the defendant for which plaintiff seeks to fasten liability upon him were those of the receiver of a railroad company, the statute requiring dangerous machinery to be guarded has no application. But whether that be so or not, the statute is without influence because the plaintiff did not by his pleading bring his case within its terms. The naked question, therefore, is whether, independently of the statute, negligence can be predicated of defendant's failure to guard the cog-wheels. Appellant insists that at common law the master incurs no liability for a failure to guard dangerous machinery; respondent on the contrary asserts that, if

**Guarding  
Machine.**

ordinary care requires such machinery to be guarded in order to render the place in which the servant is directed to work reasonably safe, then the master is liable for injuries to the servant resulting from a failure to exercise such care. Recurring briefly to the facts, it appears that the motor and gearing were so fenced about that none of defendant's employees, except those who inspected, repaired, oiled or cleaned them, had occasion to, or could, approach or be about the cogwheels, while in the performance of their work. If the inspection, repairing, oiling and cleaning were done when the machine was not running, then without question there was no necessity for guarding the cogwheels. But plaintiff's case rests entirely on his assertion, which must be assumed as true because supported by the finding of the jury, that he was required to clean the motor and shafting while the machine was in operation. In doing his work under that condition, it became necessary during the course thereof for plaintiff to extend his hand and arm down into the space of eight inches between the gears and the motor and wipe the hardened grease off of the under-side of the boxed shaft of the small cogwheel, in which there was more or less vibration, in immediate proximity to where the cogs of that wheel were feeding into those of the large one while speeding at the rate of 1200 revolutions a minute. The extent of the danger encountered by plaintiff in so doing requires no elaboration. Defendant had a housing for the gears which had been furnished with the machine by the manufacturer. Its use, while in no way interfering with the practical operation of the machine, made it impossible for any one working around or about the cogwheels to be caught or injured by them. On this state of the facts can it be said as a matter of law that the duty owed by defendant to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work did not require the former to maintain the cover around the gears? It is sometimes assumed that statutes requiring dangerous machinery to be guarded were enacted because, regardless of the situation thereof and attending circumstan-

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ces, the master at common law is under no duty to guard such machinery. This assumption, it is believed, grows out of efforts to make plain the scope and purpose of the statutes rather than from a consideration of the legal principles applicable to the relation of master and servant. Such statutes usually specify with particularity the machines or parts of machines to be guarded, as well as the circumstances under which they are required to be guarded, and in their exposition the impression is sometimes conveyed that as to machinery not within the terms of the statute, because there is no statutory duty to guard it, the duty to exercise ordinary care in that respect is also absent. Of course no such inference is intended or would be justified by the premises. It is manifest that if a given act were negligent before the passage of a guarding statute, its character in that respect would not be changed in the least by the enactment of such a statute, whether comprehended within its terms or not. In the case at bar, if the statute were applicable, on the facts disclosed, the question of defendant's negligence would be entirely foreclosed and his liability absolutely fixed, but it does not follow as a matter of law, that, because the statute is without application, the defendant was not negligent. The test which determines whether defendant's failure to guard the cogwheels constituted negligence was in no way affected by the passage of the statute and is to be applied wholly apart from any consideration of the statute, and that test is, was such failure, under the facts shown, consistent with the exercise of ordinary care? Considered in the light of such test the situation discloses that defendant had in operation a machine about which he required plaintiff to work, that the danger encountered by plaintiff thereby was speakingly apparent, that at a trifling expense a guard could have been maintained on such machine that would not in any way have lessened the efficiency of its operation, and that had defendant maintained such guard the danger to plaintiff would have been wholly removed. It may be that under an ex-

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panding view of social duty the standard of "ordinary care" that is habitually exercised by that rather elusive person, the ordinarily careful and prudent man, has advanced somewhat, but whether it has or not it certainly cannot be said that all men of reasonable minds would now concur in the opinion that the exercise of such care did not require the defendant to guard the machine in question, even though the danger of contact with it was perfectly obvious.

While the courts of this State have always recognized the right of the master to adopt such methods and to select such appliances for the prosecution of his industry as he may see fit, yet they have consistently held that that right must be exercised within the limits of ordinary care. Where a servant has received injury on account of the character of the appliance with which, or the place in which, he was required to do his work, the liability of the master in respect thereto has been invariably determined by the application of the rule which required him to exercise ordinary care in furnishing such place or appliance. In *Curtis v. McNair*, 173 Mo. 270, 283, we followed the lead of the Supreme Court of the United States in laying down "as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence." For us to now hold that, aside from the statute, the master is under no duty to fence or guard dangerous machinery, regardless of the situation or the circumstances, would be for us to put aside fundamental principles that have heretofore guided us in dealing with cognate questions and arbitrarily create an exception that could not be justified on any ground of right or reason.

Appellant's contention that at common law there is no duty to guard dangerous machinery finds apparent support in the decisions of the courts of those jurisdictions that give effect to a doctrine of the as-

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sumption of risk that is not entertained in this State. Under the rule that obtains in such jurisdictions the peril of an unguarded machine, like that growing out of almost any other conceivable condition or defect of place or appliance, if open and obvious, so that the servant has actual or constructive knowledge thereof, is a risk assumed by him. This view of the assumption of risk is the basis of the decisions referred to. [Rooney v. Sewall Cordage Co., 161 Mass. 153; Podvin v. Mfg. Co., 104 Me. 561.] The same courts that rendered those decisions hold the master liable for injuries caused by a negligent failure to fence a dangerous machine where there is no assumption of the risk, as for example, where the danger is unknown to the servant because hidden or latent. [Flynn v. Prince, etc. Co., 198 Mass. 224; Wilson v. Linen Co., 50 Conn. 433; McDonald v. Steel Co., 140 Mich. 401; Turner v. Lumber Co., 119 N. C. 387.] As it is the rule in this State, to which there is no exception, that the servant never assumes a risk that grows out of the master's negligence, however plain or obvious—that the risk he does assume is the peril incident to the service remaining after the master has exercised ordinary care (Williams v. Pryor, 200 S. W. 53), it is apparent that cases from other States like those cited above, instead of sustaining appellant's position, are persuasive authority for the contrary holding.

Cole v. Lead Co., 240 Mo. 397; Czernicke v. Ehrlick, 212 Mo. 386, and Lore v. Mfg. Co., 160 Mo. 608, were cases involving the construction of our guarding statute. In them may be found expressions that lend countenance to appellant's contention, but, as such expressions were unnecessary to the decisions of the questions then before the court, they cannot be regarded as having the binding force of precedent. Bair v. Heibel, 103 Mo. App. 621, was a case where plaintiff had been injured by coming into contact with cogwheels. The facts and the petition brought the case within the statute, but to avoid a reversal on account of erroneous instructions, it appears that the plaintiff on appeal en-

deavored to shift his position and hold the defendant on a common-law liability. His instructions, however, on the facts, were equally faulty under that theory. In the course of the opinion the court said (without expressly deciding, because it was not necessary to do so): "It seems there is no rule of the common law requiring dangerous machinery to be fenced or guarded." But the same court in the later case of *Letanovsky v. Shoe Co.*, 157 Mo. App. 120, without reference to the earlier one, held that it was for a jury to say whether the defendant was negligent in failing to provide a guard for a splitting machine in a shoe factory. And we so hold in the case at bar with respect to the defendant's failure to maintain a guard or cover on the cogwheels which caused plaintiff's injury. [18 R. C. L. 594, sec. 94; *Brooks v. Oil Co.*, 100 Miss. 849, Ann. Cas. 1914A. 656; *Dettering v. Levy*, 79 Atl. (Md.) 476; *Westman v. Lumber Co.*, 91 Pac. (Ore.) 478; *Prattville Cotton Mills v. McKinney*, 59 So. (Ala.) 498.

II. In respect to the alleged negligent failure to repair, the petition charges that, because the boxing and babbitt bearings were old, defective and loose, and the gear wheels did not mesh true with each other, there was a lateral movement of the gears and a vibration of the motor frame and the bearings on the shafting, and that it was this lateral movement of the gears and this vibration of the boxing that he was wiping at the time of his injury that caused plaintiff's sleeve to feed into the cogs. It is appellant's contention that the evidence fails to show either that the boxing and babbitt bearings were old, defective or loose, or that a lateral movement of the gears and vibration of the shaft or boxing caused plaintiff's injury. To set out *in extenso* the evidence relative to this phase of the case would unduly lengthen this opinion. The conditions shown by it may be briefly summarized as follows: The small cog wheel, together with its axle, had a lateral motion of one-thirty-secondth of an inch; this motion was

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Babbitts.**

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necessarily incident to the operation of the motor and could not have been avoided. The rim of the large cog-wheel was slightly inclined toward the axis of its rotation so that when the wheel was in motion it had the appearance of wobbling. The wheel was not loose on the axle and had no play there, but the bore being a little too large for the axle a key had been driven in to tighten it, and this tilted the rim out of line to the extent that during the course of a revolution it projected to either side one-eighth if an inch more than it would have done had it been plumb or set at right angles with the axle. To the extent of the one-thirty-secondeth of an inch of lateral motion of the small wheel and the slight wobble of the large one, the gears did not mesh true, but this failure to mesh true was not caused by worn, defective or loose bearings, and it did not in any respect lessen the efficient operation of the gears. It does not appear that they had any other lateral movement. When the machine was running there was at all times a vibration of the motor frame, gears and shafting. This was more pronounced when the machine was at work. When the shear would first come into contact with the metal plate in the operation of punching a hole in it, there would be a grinding noise of the gears, and for the instant, a slowing of their speed and a tendency of the small cogwheel to pull out and away from the large one. At such times the machine "chattered and quivered." This action, however, was usual and ordinary and did not indicate that the machine was out of repair. One of plaintiff's witnesses, a machinist, expressed the opinion that it was too light for the work for which it was used. In any event, the constant vibration caused the boxing and the motor frame itself to work loose from time to time and constant attention was required to keep them tight. It was also necessary at indefinite intervals to renew the babbitt linings. A careful and painstaking reading of the record, however fails to disclose any substantial evidence that *at the time of plaintiff's injury*, either the motor frame or boxing was loose, or that the boxing and babbitt bearings were



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worn, defective or loose. The evidence was not sufficient, therefore, to take the case to the jury on the issue of the defendant's negligent failure to repair.

III. The plaintiff testified that he knew and fully appreciated the danger attendant upon cleaning the boxing next to the revolving cogwheels, but that as the gears fed upward he thought he could reach over the  
**Obvious** axle and wipe the grease from the under side  
**Danger.** without his sleeve being caught. Whether the danger of so doing was so great that an ordinarily careful and prudent man would not have attempted it, was, we think, a question for the jury.

IV. As the jury were permitted under the instructions to find for plaintiff on either of two specifications of negligence, and as to one the evidence  
**Two Theories.** was insufficient to support a finding, the judgment will have to be reversed and the cause remanded for another trial. It is so ordered. *Brown and Small, CC., concur.*

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

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WALTON BALLMAN, by H. R. BALLMAN, His Next Friend, v. H. A. LUEKING TEAMING COMPANY, Appellant.

Division One, March 2, 1920.

1. **NEGLIGENCE: Automobile Injury to Traveler: Stopping Car: Knowledge of Peril.** Where there is substantial evidence that the automobile truck could have been stopped within a few feet, that the night was clear and the driver could have seen plaintiff skating on the roadway at the intersection of two traveled streets, three blocks away, and that the driver neither slackened his speed nor

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signaled his approach, whether he could have reduced his speed and stopped before he reached plaintiff, and whether he knew, or by carefully watching would have known, plaintiff was in peril from the truck if he proceeded farther, were questions for the jury to determine.

2. ———: ———: ———: ———: **Contributory Negligence.** Even though the inference from the evidence that the negligence of the little boy skating in the roadway at the intersection of two traveled streets contributed to his injury is unavoidable, if the evidence leaves the jury free to find that the driver of the automobile truck had a fair chance to avoid running over the boy, after his danger became apparent to the driver, or would have done so had he kept a proper lookout, the case is for the jury.
3. ———: ———: ———: ———: ———: **Verdict Notwithstanding: Children Playing on Street.** Testimony by the little boy that he looked west when at the north line of the east-and-west street and saw no vehicle coming and the fact that he was struck, by an automobile traveling eastward, at the end of the arc around which he skated in turning back northward in the north-and-south cross street, and testimony of a companion, five or six feet behind him, that as he entered the east-and-west street he saw the automobile a half block away, have a tendency to prove that the automobile was on the left side of the street, and that the driver had ample time to signal, to veer his machine to the south so as to miss the boy, or to stop, and is sufficient to authorize a verdict for plaintiff notwithstanding the boy's movements and neglect to watch out for his safety as participating causes of his injury. Admitting that if his companion saw the automobile the ten-year-old boy could also have seen it, the immaturity of the boy, the habits of boys to play on the streets, the thoughtlessness of children as compared to men, and the failure of the driver to signal, must also be considered, and it was proper to submit the issue of negligence of the driver in ways alleged in the petition other than in not doing what he could to avoid the collision, after he knew, or could have known, it was impending.
4. **EVIDENCE: Experiments: Similar Conditions.** For experiments made to determine whether certain signs painted on the automobile truck which struck the plaintiff were visible by plaintiff and his companion, conditions under which the incident in dispute happened must be the same in essential particulars as those under which the tests were made; and in this case, in which was admitted the testimony of several witnesses for plaintiff to prove, by way of experiments, that it was possible for the two boys to have read the sign, as they testified they did, it is held that the conditions were not sufficiently reproduced in the experiments for the result to be admitted in evidence.

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5. **NEGLIGENCE: Instruction: No Itemization of Specific Acts.** An instruction for plaintiff, which not only directs the jury to find for him if the specific acts of negligence declared on were committed, but also if the driver of defendant's automobile truck operated and propelled it in a manner which, under all the circumstances mentioned in evidence, was not careful and prudent, is erroneous. A defendant charged with a negligent tort has the right to be informed what particular negligent acts plaintiff relies on, and the instruction should require the jury to find one or more of the specific acts which the evidence tends to establish.

Appeal from St. Louis City Circuit Court.—*Hon. John W. Calhoun*, Judge.

REVERSED AND REMANDED.

*Bryan, Williams & Cave* and *Walter H. Nohl*, for appellant.

(1) The trial court should have sustained appellant's demurrers to the evidence. (a) The evidence showed no negligence on the part of appellant. *Stotler v. Railroad*, 200 Mo. 146; *Berry on Automobiles* (2 Ed.), p. 158; *Battles v. Railway*, 178 Mo. App. 624. (b) The plaintiff was guilty of contributory negligence as a matter of law. *Stotler v. Railroad*, 200 Mo. 146; *White v. Railroad*, 250 Mo. 482. (2) A witness should not be permitted to state his conclusions as to the relationship created by an unambiguous contract, or as to the contents of a written instrument. *Benton v. Craig*, 2 Mo. 198; *Filley v. Talbott*, 18 Mo. 416; *State v. Salmon*, 216 Mo. 523; *Land Co. v. Spellings*, 236 Mo. 39; *Kuhn v. Schwartz*, 33 Mo. App. 610; *State v. Barnett*, 110 Mo. App. 594; *State v. Hall*, 158 Mo. App. 125; *Wise v. Insurance Co.*, 23 Mo. 80; *Ellis v. Brand*, 176 Mo. App. 383; *State v. Huff*, 161 Mo. 488. (3) The trial court erred in admitting respondent's experiment on visibility. *Graney v. Railway*, 140 Mo. 103; *Chamberlain v. Mo., E. L. & P. Co.*, 158 Mo. 1; *Riggs v. Railroad*, 216 Mo. 327; *State v. Bass*, 251 Mo. 120; *Helzemer v. Railroad*, 261 Mo. 411; *Osborne v. Eyster*, 195 Mo. App. 523; *Lloyd Chemical Co. v. Rag Co.*, 145 Mo. App. 689. (4) The

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trial court erred in submitting to the jury a general charge of negligence and an issue not pleaded. *Waldhiser v. Railroad*, 71 Mo. 516; *Schneider v. Railroad*, 75 Mo. 296; *McNamee v. Railroad*, 135 Mo. 447; *McCarthy v. Rood Hotel Co.*, 144 Mo. 402; *Allen v. Transit Co.*, 183 Mo. 32; *Davidson v. Transit Co.*, 211 Mo. 361; *Beave v. Transit Co.*, 212 Mo. 351; *State ex rel. v. Ellison*, 270 Mo. 653; *Sommers v. Transit Co.*, 108 Mo. App. 324; *Miller v. United Railways Co.*, 155 Mo. App. 528; *McDonnell v. Columbia Taxicab Co.*, 168 Mo. App. 351; *Clark v. General Motor Car Co.*, 177 Mo. App. 628; *Young v. Dunlap*, 195 Mo. App. 123.

*Frank Coffman* for respondent.

(1) As defendant did not stand on its demurrer at the close of plaintiff's evidence, that question must be answered in view of all the evidence; that which was offered by defendant as well as plaintiff. *Klockenbrink v. Railway*, 172 Mo. 683; *McPherson v. Railroad*, 97 Mo. 253; *Riggs v. Railway*, 216 Mo. 310; *Eswin v. Railroad*, 96 Mo. 294; *Jennings v. Railroad*, 112 Mo. 268; *Riley v. O'Kelly*, 250 Mo. 660; *Lareau v. Lareau*, 208 S. W. 243. (a) The evidence showed defendant to be guilty of negligence *per se*. *Laws* 1911, pp. 326, 327, subsec. 2, sec. 8; *Battles v. Railway*, 178 Mo. App. 623; *Koenning v. Railway*, 173 Mo. 725; *Underwood v. Railway*, 190 Mo. App. 407. (b) The cases—*Stotler v. Railway*, 200 Mo. 107, and *White v. Railroad* 250 Mo. 476,—cited and relied on by appellant, do not support its theory. The actions of minors are not measured in law by the standard applied to persons of mature years. *Zalotuchin v. Railway*, 127 Mo. App. 577; *Brown v. Railway*, 127 Mo. App. 499. (c) A minor is not necessarily guilty of contributory negligence although under the same circumstances an adult would be as a matter of law. *Moeller v. Railways Co.*, 133 Mo. App. 75; *Anderson v. Railroad*, 161 Mo. 411. (d) When contributory negligence is not pleaded, and plaintiff's own testimony does not convict him of such, that de-

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fense is out of the case. *Taylor v. Railway*, 256 Mo. 216; *Collett v. Kulhman*, 243 Mo. 591. (2) Appellant's assignment of error, that the witness, John E. Murphy, was allowed to state conclusions about the relations, covered by written contract, is untenable, as appellant pointed out no particular part of the testimony or conclusions, that it wanted stricken out. And the only part of the witness's testimony that could have been a conclusion was by the witness himself withdrawn and corrected. *Hafner Mfg. Co. v. St. Louis*, 262 Mo. 634; *State ex rel. v. Diemer*, 255 Mo. 346; *Grimm v. Gamache*, 25 Mo. 42. (3) The test was made under substantially the same circumstances as existed at the time of the accident and it was not error to admit it. *Hunt v. City*, 211 S. W. 676; *Griggs v. Dunham*, 204 S. W. 574. (a) But appellant cannot complain of the alleged error, if any, because the generality of its objection to the testimony was fatal to such objection. *Clark v. Conway*, 23 Mo. 442; *Hafner v. St. Louis*, 262 Mo. 634; *State ex rel. v. Diemer*, 255 Mo. 346; *Grimm v. Gamache*, 25 Mo. 42. (b) The motion to strike out came after the unfavorable answer, and was too late. *Mann v. Balfour*, 187 Mo. 304; *Casey v. Gill*, 154 Mo. 184; *State v. Marks*, 140 Me. 668. (4) Respondent's instruction was within both the purview of the petition and the evidence and has been approved. *Cool v. Petersen*, 189 Mo. App. 725; *Denny v. Randall*, 202 S. W. 602; *Brooks v. Harris*, 207 S. W. 296; *Selinger v. Cromer*, 208 S. W. 871. (a) And it was not broader than the pleadings. *Selinger v. Cromer*, 208 S. W. 873; *Lange v. Railroad*, 208 Mo. 476. (b) And when one act of negligence, sufficient to authorize recovery, being alleged in the petition, and properly submitted to instruction, any error of the instruction in submitting another act of negligence was not prejudicial to defendant. *Riggs v. Railroad*, 212 S. W. 879; *Moyer v. Railroad*, 198 S. W. 842.

GOODE, J.—The plaintiff had his right arm crushed about the elbow, so as to leave it permanently stiffened,

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by a motor truck alleged to belong to defendant company and while driven by an employee of it. The accident occurred at the intersection of Seventeenth and Mullanphy streets, in St. Louis, about seven o'clock and ten minutes, in the evening of October 9, 1914. On the trial of this action brought to recover damages for the injury, a heavy verdict was returned in plaintiff's favor and from a judgment entered thereon, the appeal was taken.

At the date of the accident plaintiff, a boy of ten years of age, was skating with a companion on the roadway of Seventeenth Street, a north-and-south thoroughfare, paved with asphalt, in the block between Mullanphy and Chambers streets, both east-and-west thoroughfares, the latter being to the north. The two boys skated from Chambers along the west side of Seventeenth Street to Mullanphy, and while they were turning around at the intersection of the two streets, intending to go back north along the east side of Seventeenth Street, the left front mud guard of the truck struck plaintiff, whirling him about and throwing him down with his right arm under the truck, so that the left rear wheel ran over it. At the time the other boy, Milton Lammers, was four or five feet behind plaintiff, and the latter was from six to eight feet from the northeast corner of Seventeenth and Mullanphy streets. The automobile was proceeding to its garage, which was east of Seventeenth Street, and had traveled eastward along Mullanphy for many blocks. Plaintiff testified that when he reached the north curb-line of Mullanphy Street he looked east and west and saw no vehicle coming from either direction, heard no rumbling of wheels, nor any signal by a horn, bell or otherwise. The boy Lammers, who was six feet or so behind plaintiff, saw the truck coming eastward and in the middle of the block to the west; he heard no signal, but heard the rumble of the truck, which was not very loud.

The driver testified he did not slacken speed as he approached Seventeenth Street and thought he blew the horn, because he generally did. Witnesses, including the boys, testified the words "Rice-Stix Dry Goods Com-

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pany" were painted on the side of the truck, and were visible and read, either in whole or in part, by them. Some of them saw only the words "Rice-Stix." This testimony was intended to show the truck which ran over plaintiff belonged to defendant and was operated under a contract between H. A. Lueking and the Rice-Stix Dry Goods Company, entered into July 1, 1914, whereby said Lueking agreed to do the carting and draying for said Dry Goods Company for one year. Lueking, who was the president of the Lueking Teaming Company, said he did not know whether or not said company was incorporated at the date of the accident, but an attorney of Rice-Stix Dry Goods Company testified the company was on that date hauling for the Dry Goods Company, and permitting this testimony to go to the jury is complained of as an erroneous ruling. It should be said the attorney, when shown the contract, said he was mistaken, and that the hauling, when the accident occurred, was done by Lueking, individually. He said, however, he knew the Lueking Company did the hauling for his company from trying a case which arose previous to the accident where their automobiles were involved; had always tried cases "as being the H. A. Lueking Company." Two trucks were provided by Lueking with the name "Rice-Stix Dry Goods Company" on them, to be used in performing the aforesaid contract. Lee Arens was the chauffeur who operated one of them and the one charged to have inflicted the injury in question, and John Amend drove the other. There is testimony *pro* and *con* about the visibility of the words on the truck, considering the light by which they must have been read on the evening of the accident. Two gas street lamps were burning at the crossing, one at the northeast and one at the southwest corner. The testimony is conflicting as to whether the evening was clear or misty at the hour of the accident. It was shown other trucks bearing the name "Stix-Baer & Fuller Dry Goods Company" were in use, and that one of them which passed down Mullanphy Street near the time of the accident, might have caused it, and the witnesses who testified "Rice-Stix Dry Goods

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Company" was on the truck in question, might have mistaken the name. It was one defense, and some witnesses, including the chauffeur who operated the truck alleged to have hit the boy, testified that no truck belonging to defendant and operated by its driver, ran over any one the day of the accident. The bearing of other facts upon our conclusions will be understood best if stated in connection with the propositions to which they are relevant.

Specific acts of negligence are charged in the petition, which may be epitomized as follows: First, in violation of Sub-section 2 of Section 8 of the Laws of 1911, p. 326, the driver of the automobile of defendant which ran over plaintiff, failed to diminish speed, or give timely signals by horn, bell or other device, as he was approaching plaintiff, who was then in the traveled part of Mullanphy Street, along which the truck was traveling and when it was approaching an intersecting highway. The portion of the statute counted on reads thus:

"Upon approaching a pedestrian, who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway, where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signalling." [Laws 1911, p. 327.]

Second, at the time plaintiff was injured, defendant's driver in charge of its automobile truck, was operating it on a public highway in an imprudent manner in this: he failed and neglected to slow the automobile down or give a timely signal when he was approaching an intersecting highway and also plaintiff, who was on the traveled part of said highway; and negligently drove and operated said automobile at said time and place, at a speed of twelve miles an hour, which was likely to and did endanger the life and limbs of plaintiff, in violation of Section 9, Laws of Missouri 1911, page 327. The section counted on in that paragraph of the petition reads:



“Every person operating a motor vehicle on the public highway of this State shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life and limb of any person: *Provided*, that a rate of speed in excess of twenty-five miles an hour for a distance of one-half of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent.”

Third, at the time and place plaintiff was injured, defendant's said driver was operating the automobile along a public street at a place much used for travel and where said driver should have anticipated persons were apt to be; and said driver, in violation of Sub-section 9, of Section 12, Laws of Missouri 1911, page 330, negligently failed to use the highest degree of care that a very careful person would use under like circumstances to prevent injury to plaintiff in this: he drove and operated said automobile at a high and dangerous rate of speed, to-wit, twelve miles an hour, along and across the streets, and neglected to give a timely warning to plaintiff by horn, bell, etc., or to give any signal of the approach of the automobile, after he saw, or in the exercise of the highest degree of care could have seen, plaintiff in a position of danger; that he failed to slow said automobile down or give any signal at all when approaching a highway when his view was obstructed. That paragraph declared on this part of the Act of 1911:

“Any persons owning, operating or controlling an automobile running on, upon, along or across public roads, streets, avenues, alleys, highways or places much used for travel, shall use the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons on, or traveling over, upon or across such public roads, streets, avenues, alleys, highways or places much used for travel. Any owner, operator or person in control of an automobile, failing to use such degree of care, shall be liable to damages, to a person or property injured by failure of the owner, operator or persons in

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control of an automobile, to use such degree of care, and in case of the death of the injured party, then damages for such injury or death may be recovered, as now provided or may hereafter be provided by law, unless the injury or death is caused by the negligence of the injured or deceased person, contributing thereto."

Fourth, said driver, at the time and place of the injury to plaintiff, by the exercise of ordinary care, could have seen plaintiff in a position of peril, in time to have stopped said automobile, or to have slackened its speed sufficiently to avoid hitting and injuring plaintiff; but that said driver negligently failed to use ordinary care or make any effort to stop the automobile or slacken speed. That paragraph states a case of common-law negligence.

Defendant answered by a general denial.

Among the rulings assigned for error, one relates to an instruction granted at plaintiff's request and covering all the facts on which plaintiff relied for a verdict. The complaint of this instruction is that, besides setting out the specific acts of negligence charged in the petition and instructing the jury to return a verdict for plaintiff, if they found either of those acts was proved by the weight of evidence, it directed a verdict for him if the jury found "defendant's driver propelled and operated said automobile in a manner which, under all the circumstances mentioned in the evidence, was not careful and prudent."

Defendant also contends a demurrer to the evidence should have been sustained, because no negligence was proved against defendant or its chauffeur, and contributory negligence on the part of plaintiff was conclusively shown.

Another error alleged is the admission of testimony of several witnesses for plaintiff to prove it was possible to read a sign painted on an automobile which was driven past the scene of the accident, by way of experiment. This testimony was objected to because the conditions existing at the time of the experiment, February, 1917, a few days before the trial, were not the same as regards

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the light and the color of the lettering, etc., as were the conditions at the time of the accident.

Still another assignment questions the instruction for plaintiff for particulars apt to confuse and mislead the jury, by assuming facts were established by the evidence when their existence was controverted. We deem these unfounded and will not enumerate them.

I. The case was for the jury on testimony adduced to prove the driver of the truck neither slackened speed as he drew near the crossing, nor signalled his approach; to prove, too, he could have reduced his speed or stopped before he reached plaintiff and after he knew, or, by watching carefully, could have known plaintiff was in peril from the truck if it proceeded unchecked. An expert chauffeur testified a truck weighing 6500 pounds and running over a dry pavement at the rate of ten or twelve miles an hour, could be stopped within twenty feet. The speed mentioned was that of the truck charged to have hurt plaintiff at the moment of collision, and though its weight was unproved, from the description of it the inference is fair that it weighed less and could have been stopped as soon as the one the witness mentioned. A chauffeur of defendant who, on the evening of the accident operated a truck precisely like the one in question, testified he was driving between eight and ten miles an hour and stopped within seven feet; that both trucks were empty. This witness said, too, he could see from Seventeenth to Fourteenth Street, or three blocks, and the driver of the truck in question said the night was clear when he turned in at the garage near the time of the accident.

No defense on the score of plaintiff's negligence was pleaded, and whether he contributed to his injury is of no moment unless the evidence, including his own,

**Contributory  
Negligence.**

shows he did beyond inference to the contrary. [Hudson v. Railroad, 101 Mo. 13.] Even if that inference is unavoidable, the evidence left the jury free to find the chauffeur had a fair chance to avoid running over plaintiff, if the lat-

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ter's danger, while he was circling round in Mullanphy Street, was apparent to the chauffeur or would have been had he kept a proper lookout. [McGee v. Railroad, 214 Mo. 539; Potter v. Railroad, 136 Mo. App. 145.]

II. What remains of the inquiry regarding the effect of plaintiff's movements and neglect to watch out for his safety as participating causes of his injury, is whether he should have been allowed a verdict on any finding other than neglect of the chauffeur to take measures to avoid running against him after his peril became visible.

**Humanitarian  
Rule.**

Relevant to this point is plaintiff's testimony that he looked west when at the north line of Mullanphy Street and saw no vehicle approaching, also the circumstance of the truck catching him at the east end of the arc around which he skated in turning northward, and only six or eight feet from the northeast corner of the two streets—a fact tending to prove he was not run over from dashing into Mullanphy Street immediately in front of the truck; and this circumstance is the more significant because his companion, five or six feet behind him, saw the automobile as he entered Mullanphy Street, half a block away; a distance which afforded the chauffeur time to signal, to veer his machine to the south so as to miss plaintiff, or to stop. The testimony has a tendency, too, to prove the truck was travelling on the left, instead of the right side of Mullanphy Street, when plaintiff was run over. It is true that if plaintiff's companion saw the truck, plaintiff could have seen it also if he had looked intently; but considering his immaturity, the omission to signal to attract his attention, the habit of city children to play in the streets and the thoughtlessness of boys as compared with men, it was proper to submit the issue of negligence of the chauffeur in ways alleged in the petition other than not doing what he could to avoid the collision, after he knew, or should have known, it was impending. [Moeller v. United Rys., 242 Mo. 721, 727; Fry v. Transit Co., 111 Mo. App. 324.]

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III. No error was committed in admitting the testimony of the attorney for the Rice-Stix Dry Goods Company, that the Lueking Company, and not Lueking individually, was doing the hauling of the **Vacillating Testimony.** Dry Goods Company when the accident occurred. The witness vacillated in his statements, but they were for the jury and the objection that they were equivalent to letting the witness interpret the written contract is untenable. He offered no explanation of its meaning, but after it was exhibited to him, merely retracted, in a way, the statement made previously that the Lueking Company did the hauling. Enough testimony was adduced in support of this fact to go to the jury; and so appellant conceded, in effect, by remarking in its brief that "outside of the testimony of this witness, there was very little evidence for respondent on this point."

IV. Witnesses testified for both parties regarding the visibility of signs painted or hung on the sides of automobiles used in experiments conducted subsequent to the accident; and defendant contends the **Experimental Tests.** experiments for the plaintiff were made under conditions so dissimilar to those under which the witnesses who testified to reading "Rice-Stix Dry Goods Company" on the truck which ran over plaintiff, as to render inadmissible testimony of the result of the tests. For this species of evidence to be admissible, the conditions under which the incident in dispute happened, must have been the same in essential particulars as those under which the tests were made. [Riggs v. Railroad, 216 Mo. 304, 327; 1 Wigmore, Evidence, sec. 442; Greenleaf Evidence (16 Ed.), sec. 14b.] Otherwise, the occurrence or non-occurrence of an analogous result during the experiment, may mislead the jury into surmises that have no substantial basis in the facts, instead of aiding them to conclude the controverted incident was or was not possible, or probable. [See Lloyd Chemical Co. v. Rag Co., 145 Mo. App. 675, where the subject is examined and ex-

cerpts from pertinent authorities quoted.] The issue in the present case is, could the boys have read the words "Rice-Stix Dry Goods Company," on the truck as it passed down Seventeenth and Mullanphy Streets, when they were at or near the crossing of those streets, and could another witness, standing one hundred and seventy feet north on the west side of Mullanphy Street, have read them, as he testified he did. The experiment for plaintiff was made February 19th, two years or more after the date of the accident, but when the days were about the same length as they were on said date, at the same hour in the evening and by the same faint daylight and the same degree of illumination from the street lamps. Other conditions were different. A canvas painted green was fastened to the curtains of a passenger automobile, six feet above the surface of the street and the words "Rice-Stix Dry Goods Company" were painted on the canvas in white letters. The trucks of defendant with that sign on them were more like express wagons, the lettering was in gilt on the green sides of the bed, three and one-half feet above the surface of the street, and the sides were sunk an inch or so in a panel, and above the panel a sort of flange or wing projected with an upward tilt. At least one of the witnesses of the experiment observed the sign on the side of the passenger automobile while it was motionless and before it was driven past these witnesses. This no doubt enabled him to make out the words of the sign more easily when it was driven past him during the experiment. The conditions under which the witnesses for plaintiff must have read the lettering on the truck the evening of the injury, were not sufficiently reproduced in the experiment for the result to be admitted in evidence.

V. The main instruction given at plaintiff's request not only directed the jury to find a verdict for him if the specific acts of negligence declared on had been committed by defendant, but also if the driver propelled and operated the truck in a manner which, under all the circumstances mentioned in evidence,

**Instruction.**

was not careful and prudent. Such instructions have been condemned repeatedly, for the reason that a defendant who is accused of a negligent tort has the right to be informed what particular negligent acts the plaintiff relies on, so the defendant may prepare to disprove them, if they were not committed. When the petition is general in its charges of negligence, the defendant usually may move for specific averments; and if particular acts are charged, a recovery can be had only on proving the occurrence of one or more of those acts. The rule is expressed with perfect clarity in *McManamee v. Railroad*, 135 Mo. 440, 447.

Four cases are cited in plaintiff's brief to support the instruction, but neither of them does in the least. [*Cool v. Peterson*, 189 Mo. App. 717; *Denny v. Randall*, 202 S. W. 602; *Selinger v. Cromer*, 208 S. W. 871; *Riggs v. Railroad*, 212 S. W. 878.] In the first of those cases an instruction, submitting the facts for which a verdict might be returned for the plaintiff, mentioned, as the opinion said, "the precise specification of negligence relied upon in the petition." Another instruction stated, in an abstract way, the duty of the person operating an automobile on a highway to use the highest degree of care; and the court refused to reverse the judgment because of that instruction, as it could not have been misleading when read in connection with the one which required the jury to find the very acts of negligence alleged as the condition of a verdict for the plaintiff. In the second case the act complained of was driving an automobile close to and around the team and buggy of the plaintiff at a dangerous speed and carelessly running over the plaintiff's dog, which was near the team. The court instructed that it was the defendant's duty to use the highest degree of care that a prudent person would use under similar circumstances while operating his automobile on a highway, and if the jury found the defendant, in passing the plaintiff, ran at an excessive speed near his buggy, without using that degree of care and by reason thereof killed the dog, the verdict should be for the plaintiff. The instruction

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required the jury to find the defendant guilty of the acts of negligence charged to warrant a verdict for the plaintiff. In the third case the plaintiff, who had been struck by an automobile after he had alighted from a street car, alleged the defendant saw, or by exercising ordinary care could have seen, the plaintiff alighting from the car and crossing the street in time to stop his car without striking the plaintiff. The trial court advised the jury that if the defendant, by using the highest degree of care a very careful person would use under like or similar circumstances, could have discovered the plaintiff's position in time to have avoided striking him, and she operated her said machine at said time and place at a high and dangerous speed, and failed to give a signal with her bell, etc., in time to enable the plaintiff to avoid being struck, etc. The instruction required the jury to find the defendant had been guilty of other acts of negligence than the one alleged, and of that one too, thereby imposing an unnecessary burden on the plaintiff. In the fourth of the cited cases, three careless acts were alleged, and the court, by its principal instruction, put the plaintiff's right to recover on a finding that the defendant was guilty of all three.

In the case at bar the erroneous clause of the instruction is separated from the rest by the word "or" as an independent ground for a verdict for plaintiff. It is apparent the cases cited for the soundness of the charge are inapt, and attentive study of them by counsel who wrote the brief would have saved this court the labor of the foregoing analysis.

The judgment is reversed and the cause remanded.  
All concur.



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RUELL W. JACKSON v. SOUTHERN BELL TELEPHONE COMPANY, Appellant.

Division One, March 2, 1920.

1. **AUTOMOBILE: Driver's Degree of Care: Contributory Negligence.** A driver of an automobile on a public highway is required to use "the highest degree of care that a very careful person would use under like or similar circumstances," and the statute establishes a general rule for all drivers, not only to protect the lives and property of others, but also to protect themselves and others traveling with them from injury by collision with obstructions in the road, whether legally or unlawfully placed there. Any less degree of care by the driver is contributory negligence, and bars a recovery by him for personal injury from the telephone company which had placed the obstruction in the road.
2. —: **Care Defined.** Ordinary care is such care as would ordinarily be exercised by an ordinarily careful person under the same or similar circumstances. But the statute requires the driver of an automobile on a public highway to exercise "the highest degree" of care that a "very careful person" would use under like or similar circumstances; and those words mean the highest care and caution of an experienced and competent chauffeur, since an automobile is an exceedingly dangerous machine unless kept under control. They do not mean the highest conceivable degree of prudence and skill possible to man, but the highest degree that has been demonstrated to be practicable.
3. —: **Contributory Negligence: Question for Jury.** Under the Automobile Statute of 1911, if reasonable men may honestly differ as to whether the driver of the automobile, the circumstances considered, exercised the highest degree of care of a very careful person, the question of his contributory negligence is for the jury to settle; but if his failure to exercise such care is apparent to all reasonable men from the undisputed facts in evidence, then it becomes the duty of the court to declare, as a matter of law, that his contributory negligence bars a recovery; and in this case it is held that plaintiff's own undisputed testimony unquestionably shows that he was not exercising the highest degree of care of a very careful person, and therefore a demurrer should have been sustained.
4. —: **To Right of Center of Road.** The statute (Par. 9, sec. 8, Laws 1911, p. 327) requires the driver of an automobile to turn

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to the right of the center in approaching a turn in the public highway only when he meets another person riding or driving a horse or another motor vehicle; if there is no other person or vehicle on the road, he has the right to use the center, and even the left side.

5. ———: **Skidding: Knowledge of Driver.** Where the driver of the automobile left the smooth and beaten center of the public road, when there was no necessity for doing so, and encountered clods which caused his car to skid and strike a guy telephone pole, his contributory negligence cannot be excused by a failure of the evidence to show that he did not know that automobiles would skid in turning on to rough ground and clods. A very careful person, exercising the highest degree of care, venturing to drive an automobile at a turn in the public highway, at a speed of twelve or fifteen miles an hour and with the power off, thirty or forty feet over dry clods and rough ground, in daylight, his view unobstructed, would, before doing so, at least inform himself as to the common conditions and places in the roads which cause such vehicles to skid.

Appeal from Buchanan Circuit Court.—*Hon. Thomas B. Allen, Judge.*

REVERSED.

*W. B. Norris, D. E. Palmer and Battle McCardle* for appellant; *D. A. Frank and J. W. Gleed*, of counsel.

(1) The location of the pole in question did not constitute negligence on the part of the defendant, and the accident complained of was caused by plaintiff's own fault and negligence, and was not due to any fault or neglect on the part of the defendant; and it was error for the court to refuse defendant's demurrer to plaintiff's evidence and defendant's request for peremptory instruction at the close of all the evidence. Sec. 3326, R. S. 1909; *Julia Building Assn. v. Bell Telephone Company*, 88 Mo. 258; *McCann v. Telephone Company*, 69 Kan. 210; *Elliott on Roads & Streets* (2 Ed.), par. 621; *Nelson v. City of Spokane*, 45 Wash. 31; *Atchison v. City of St. Joseph*, 133 Mo. App. 563-566; *Seibert v. Railroad Company*, 188 Mo. 657; *Eberhardt v. Telephone Company*, 91 Kan. 763; Par. 9, sec.

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12, Laws 1911, p. 330; *Massie v. Barker*, 113 N. E. 199; *Baldwin v. Maggard*, 162 Ky. 424; *O'Dowd v. Needham*, 13 Ga. App. 220; *Wheat v. St. Louis*, 179 Mo. 572. (2) Instruction No. 1, given on behalf of plaintiff stated incorrectly the degree of care required of plaintiff while driving an automobile upon the highway. Par. 9, sec. 12, Laws 1911, p. 330; *Mitchell v. Brown*, 190 S. W. 354; *Meenach v. Crawford*, 187 S. W. 879; *Floweree v. Thornberry*, 183 S. W. 359; *Ex parte Kneedler*, 243 Mo. 632; *Baldwin v. Maggard*, 162 Ky. 424; *O'Dowd v. Needham*, 13 Ga. App. 220; *Massie v. Barker*, 113 N. E. 199. (3) Said instruction ignored the issue made by the petition that the pole obstructed, narrowed and made unsafe the highway, and directed a verdict for plaintiff if it found only that plaintiff was incommoded by the manner in which the pole was set. It ignored the issue of negligence. *Gay v. Mutual Union Tel Co.*, 12 Mo. App. 485; *Julia Building Assn. Co. v. Tel. Co.*, 88 Mo. 258; *Seibert v. Railroad*, 188 Mo. 657; *Atchison v. City of St. Joseph*, 133 Mo. App. 563; *Hook v. Bowden*, 144 Mo. App. 330; *Reedy v. Brew. Assn.*, 161 Mo. 523; *Reno v. St. Joseph*, 169 Mo. 543; *Perrigo v. St. Louis*, 185 Mo. 274.

*L. C. Gabbert* for respondent.

(1) The pole or guy stub in question was admitted to be nine feet in the public highway. The overwhelming evidence is to the effect that this pole narrowed the highway and was frequently run into and against by automobiles other than the plaintiff's. Placing the pole in the highway nine feet from its north boundary incommoded the public. At least the jury so found upon the overwhelming testimony to that effect. This, therefore, made the defendant a trespasser, a violator of the law and in no position to complain that the act did not constitute negligence. "An obstruction that appears to interfere with the public's rights, or to endanger the safety of travelers, or annoy those coming in contact with it at a place on the right-of-way of a public

road is an obstruction thereof, and indictable as a nuisance at common law if not under the statute." State v. Campbell, 80 Mo. App. 110; R. S. 1909, secs. 3326, 19533; Wright v. City of Doniphan, 169 Mo. 601. The proof was ample, full, complete and uncontradicted that the pole was not only nine feet within the highway, but was set in a position at the turn of the road so that persons approaching from the south could not ascertain that the pole was out in the highway until one was making or had made the turn. Numerous persons traveling upon this highway had found this to be true to their sorrow. Furthermore, plaintiff's car was at all times in the traveled roadway, which was "right up to the pole." Tetherow v. St. Jos. & Des Moines Ry., 98 Mo. 74. There is no question in this case that the act of defendant in placing the pole in the traveled roadway was the actionable proximate cause of the injury. Hull v. City of Kansas, 54 Mo. 598; Ballentine v. Kansas City, 126 Mo. App. 130; Bassett v. City of St. Joseph, 53 Mo. 290; Vogelgesang v. City of St. Louis, 139 Mo. 127; Harrison v. K. C. Electric Light Co., 195 Mo. 623; Benjamin v. Met. Street Railway Co., 133 Mo. 274; Buckner v. Horse & Mule Co., 221 Mo. 710. (2) Instruction No. 1 on behalf of plaintiff correctly stated the degree of care required of plaintiff. The rule requiring a person operating an automobile on public roads to use "the highest degree of care that a very careful person would use, under like or similar circumstances," cannot avail the defendant in this case. The defendant is not suing for injury to its property. Defendant had imposed an unlawful obstruction in the highway. It therefore cannot seek to absolve itself from damages for its wrongful or unlawful act because the statute enjoined upon plaintiff the highest degree of care toward persons properly using such highway. No other person, than plaintiff and his family, were "on or traveling over the highway." Neither plaintiff, nor any other person, could observe, on account of the deceptive perspective, that there was a pole in the road. What reason for plaintiff to be nerved to the high

tension required in a crowded highway? The statute required no such degree of care. Plaintiff is only obligated under the statute to the use of such high degree of care in order "to prevent injury or death to persons on, or traveling over, upon or across such public roads, streets, avenues, alleys, highways or places much used for travel." Laws 1911, p. 330. The degree of care required of plaintiff in order for plaintiff not to be guilty of contributory negligence has always been the degree of care that an ordinarily prudent person would use under like or similar circumstances. *Flowerree v. Thornberry*, 183 S. W. 359; *Smith v. Union Ry. Co.*, 61 Mo. 588; *Myers v. C., R. I. & P. Ry. Co.*, 103 Mo. App. 268.

SMALL, C.—Appeal from the Circuit Court of Buchanan County. Plaintiff sued defendant for personal injuries sustained by him while driving a Ford automobile which, in making a turn in the road to the west, skidded against a telephone pole of defendant near the north edge of the road. It was in the country near Saxton, Buchanan County. The verdict and judgment were for plaintiff in the sum of ten thousand dollars. Defendant duly appealed to this court.

Plaintiff testified on direct-examination: That he lived near Easton, east of Saxton, Missouri. That on the morning of the 25th of February, 1917, he started in his Ford automobile to go to St. Joseph. He had had the car twenty-three days. It was his first car. He had driven every day except one. Had driven a Ford car, but not very much, before he bought this car. On this morning, he was driving, and his wife and three children were with him in the car. He had to make a turn to the west in the road, about two miles east of Saxton. As he approached this turn he was going north. The road going north, from fence to fence, was about forty-five or fifty feet wide. and about the same running west. There was a concrete culvert running diagonally from the southwest to the northeast corners of the turn in the road. There was a line of telephone poles running

along the south side of the east-and-west road, and the west side of the north-and-south road. There was also a guy telephone pole on the north side of the east-and-west road about eight or nine feet south of the fence. The concrete culvert was thirty-eight feet long. There were ditches leading into it from the west on the north and south sides of the road. This guy telephone pole was twenty feet north of the edge of the ditch on the south side of the road. The ditch at this point was something like five or six feet deep. On the north side opposite, the ditch was not over a foot or two deep right by the pole. The ditch was four or five feet wide. The ditches got deeper as they went east towards the ends of the culvert. The road was higher in the center than at the sides, so that the water would run off. On the day in question, the road was dry, and outside of a few clods, it was smooth. The clods were little and round—not very big—on the side of the road. There was a little grass right down by the pole, between it and the center of the road. The road was pretty good right in the center. As plaintiff came north up to the turn he turned to his left to start west. Previous to making the turn, he had not noticed this telephone guy pole setting out in the roadway, until just before he hit it. He never paid any attention before that to the telephone poles along the road. Coming up from the south you could not tell that this pole was out there “to save your neck” until you turned the corner. It looked like it was right in line with the others coming south. He got the car turned and it kept skidding along on some clods, and he could not get the wheels to take (hold) when they ought to, and the first thing he knew, the right front wheel struck the (guy) telephone pole and tipped the car over and threw them out. It bursted an inner tube and the car turned over to the north. When it hit, the car just scooted sideways and tipped over against the pole. He was running about twelve or fifteen miles an hour when he hit the pole, but it was “kind of skidding along.” He was thrown out to the north of the pole. His wife and children were also thrown out and injured at the same

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time. His leg was broken. He never recovered the use of his foot, which flaps down on the floor when he steps and causes him to catch his toes and stumble if he is not very careful.

On cross-examination, plaintiff testified: That he had driven his car on each of the twenty-three days he had owned it, except one. The weather had been good, except the day after he got the car. Before purchasing this car he had driven the cars of Guy Watts and Mr. O'Brien—four to six times. O'Brien and Jim (Watts) taught him how to run his car. They just showed him how to use the brakes and feed the machine, and then he proceeded to drive it himself. During the twenty-three days, when he was driving his car, he was learning, at the same time. The driving during those twenty-three days was part of the learning. During that time, he had sometimes come to St. Joseph in his car along the same road, crossed the same culvert in the day time, and made the same turn in the road, and had passed by the same pole each time, but never paid any attention to the pole. Did not know how tall the pole was. The grass and weeds there were dry and shriveled up. Never saw anyone drive between the pole and the north fence. Lived near Saxton all his life. Had been along that road a great many times in wagons and buggies. There was no place for a team to get 'round between the pole and the fence. The pole was eight or nine feet south of the fence. The road there sloped to each side. As he approached the culvert from the south, there were no teams nor foot passengers around. He had the road all to himself. Before that, on other days, he had crossed the culvert and rounded the curve and gotten by without any trouble. He made the corner all right without striking the pole or his car skidding. On this trip, he had turned out more to the right side than he had ever done before. Before he turned to the right, coming from the south, he was traveling in the middle of the main traveled road. Did not know how much he did swing over to the right. His best judgment was two or

three feet. But this was more than on other days. No one was trying to pass him, but he swung over more to the right, because, he says, "Well, I always had—I thought I was learning more about the car that way—to keep on the right-hand side of the road, and I was trying to follow instructions." The swinging over to the right on this day was part of his trying to learn to run the car. A part of the instructions he had received about running a new car. He was about eight or ten feet south of the culvert when he began to swing out. The road over the culvert, right in the center, was smooth, hard and good. There were some clods over to the right, small round things. It was not as smooth and level over there as it was in the center. The culvert was about thirty-eight feet long and had cement retaining walls on each end. He went twelve, fifteen or twenty feet after he began to skid. "They just had it kind of jumping along there in making skids." The little clods would not let the wheels take upon the road. They obstructed the natural movement of the wheels. The car began to skid just as he had crossed the culvert. When he turned his wheel to guide the car back into the road the clods would not let it back; the wheels would slide. "That is what I call skidding—my car never skidded any other way." It skidded towards the northwest. The skidding continued from the time his hind wheels were leaving the culvert until the accident. It was getting "better," and "if I had a few feet further to have gone I would have missed it." The skidding got "better," but did not get "better early enough." He did not think he was going at the same rate of speed (as before) when he began to skid. He had his gasoline all shut off. He shut the gasoline off before he turned the corner. He thought he crossed the culvert at twelve or fifteen miles an hour. He never put on his brakes, but he thinks he slowed up a little before he began to skid, as the car was getting no gasoline. In his judgment, he was going twelve or fifteen miles an hour when he began to skid. But he never put on his brakes. All the wheels began skidding; could not tell which one started first. He



did not have time to do anything to overcome the skidding. The pole with which he collided was about thirty-five or forty feet west of the west end of the culvert. Just as soon as he noticed it skidding, he tried to get it back in the road. He turned his front wheels south. He did not keep on turning south. There was no use in turning it too short. "I turned it as short as I thought it would bear." Just turned it short and kept the front wheels turned that way, but the hind wheels and front ones, too, kept going north. He could change its course but little, if any. Just as soon as he was across the culvert, he tried to get his car to take to the south—wanted to get back in the road. He saw this pole as soon as he began to skid. He saw the ditch at the same time. He then made his efforts to avoid hitting the pole. After he got turned there was nothing to prevent him seeing the pole. There was nothing to prevent him from seeing the pole when he was in the middle of the culvert, if he had known it was there. He paid no attention. He did not think anybody would stick a pole out in the road. By paying no attention, he meant, to the side of the road. Did not have his eyes or mind on the pole. He could have seen both the fence along there and the pole, had he looked. He was not paying any attention to the fence or to just where the pole was situated. If he had looked, when he was in the center of the culvert, he could have seen the pole. The accident happened about ten o'clock in the morning. The sun was shining. The first time he saw the pole was just after he had crossed the culvert. The way the pole stood with reference to the fence line did not deceive his sight after he crossed the culvert. If he said the first time he saw the pole he was within four or five feet of it, he was just guessing at it. He was not that close to it. He noticed the pole about the time his hind wheels left the culvert, and the car went fifteen or twenty feet before it struck the pole. The pole with which he collided was something like ten or twelve feet north of the center of the main traveled part of the road. There was at that time a well traveled beaten-down part of the highway. He was not on that

part at the time of the accident. The pole, as it stood there at that time, did not interfere with anybody traveling along the well traveled hard-beaten part of the road. If he had stayed where he was, or in that part of the road where he was before he began to swing to the right, he would not have struck the pole. If he had stayed on the usual hard-beaten, traveled part of it, he would not have struck the pole. At that time, as he was traveling, he did not have to swing over to the right. He did that as part of the instructions that had been given him in using a new car. The black line, which the witness made upon the defendant's "Exhibit 2" in the case, to the best of his knowledge and belief, indicates just where the north side or north wheels of his car traveled. Plaintiff's "Exhibit A" is a fair representation of the situation approaching the culvert from the south and looking to the north. The soil composing the roadway was gumbo and becomes "kind of rough" when it dries after being muddy. Where the pole sets in the ground, the ground was about a foot lower than the center of the road. The ditch at the culvert on the north side of the road was four to six feet deep, and right at the pole was about a foot and a half deep, and the ground at the base of the pole was a foot and a half above the bottom of the ditch.

There were no other witnesses to the accident. The other testimony in the case did not differ materially from that of the plaintiff as to the condition of the road and location of the pole. In the view we take of the case, it is not necessary to set out the further proceedings at the trial except to say that the court refused to give a demurrer to the evidence asked by the defendant at the close of the plaintiff's case and also at the close of all of the evidence.

I. The first question to be decided in this case is whether the plaintiff in driving his car was bound to use "the highest degree of care that a very careful person would use under like or similar circumstances," as required by Section 12, par. 9, Laws 1911, page 330. When this case was tried below this court had not construed said statute

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with reference to the driver's contributory negligence, but since then, in the case of Threadgill v. United Rys. Co., 279 Mo. 66, 214 S. W. 161, this court has held, GRAVES, J., delivering the opinion, that if the person driving the automobile is injured in a collision with a street car, the statute applies to the plaintiff, although he is the injured party, and that he must, under the statute, exercise the highest degree of care of a very careful person, in driving his automobile, and if he fails to do so, he violates the statute and is guilty of contributory negligence. In his opinion, concurred in by all of the court of this Division, Judge GRAVES, 214 S. W. l. c. 164-165, says:

"As stated, the court modified the instructions for plaintiff by adding thereto a clause which placed upon her driver the duty of exercising the highest degree of care in the running of the machine. This the appellant assigns as error. Respondent urges that such degree of care is required by State statute, and that the court committed no error in so wording the instructions. Paragraph 9 of Section 12, Laws 1911, page 330, reads:

" 'Any persons owning, operating or controlling an automobile running on, upon, along or across public roads, streets, avenues, alleys, highways or places much used for travel, shall use the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons on, or traveling over, upon or across such public roads, streets, avenues, alleys, highways or places much used for travel. Any owner, operator or person in control of an automobile, failing to use such degree of care, shall be liable to damages, to a person or property injured by failure of the owner, operator or persons in control of an automobile, to use such degree of care, and in case of the death of the injured party, then damages for such injury or death may be recovered, as now provided or may hereafter be provided by law, unless the injury or death is caused by the negligence of the injured or deceased person, contributing thereto.' It

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would seem that this statute fixes upon the driver of an automobile the duty to exercise 'the highest degree of care that a very careful person would use, under like or similar circumstances.' The Springfield Court of Appeals, in *England v. Railroad Co.*, 180 S. W. l. c. 34, has so ruled. On the other hand, the Kansas City Court of Appeals, in an opinion by BLAND, J., in case of *Advance Transfer Co. v. Railroad*, 195 S. W. l. c. 568, has taken the opposite view . . . To like effect is *Hopkins v. Sweeney Automobile School Co.*, 196 S. W. l. c. 774, where the *Transfer Co.* case, *supra*, is cited and approved, . . . Both cases were handed down at the same time, and hence the cross-references.

"What these two cases really hold is that, as to the driver of an automobile who is injured, or whose machine is injured, or damaged, only the rule of ordinary care is applicable. They say that the statute requiring the highest degree of care is one applicable to persons traveling on or over the streets or highways; that as to such persons traveling on or over such highways he owes the highest degree of care, but as to himself, his property, or those with him, only ordinary care is required. We cannot take this view of this statute. We think that it contemplates a rule of conduct for automobile drivers upon 'public roads, streets, avenues, alleys, highways, or places much used for travel.' That rule of conduct is to use 'the highest degree of care.' . . . The person driving a motor vehicle has a rule of conduct prescribed for him by this statute. That rule of conduct is the use of the 'highest degree of care.' A failure to reach the standard prescribed by the law is negligence, and, if the negligence contributed to his injury, he cannot recover. As said before, this statute prescribes a rule of conduct. If a violation of the statute occasions injury to others, the person violating it is liable in damages. If, on the other hand, the violation of the statute occasions injury to the person violating it, such person cannot recover for injury to himself,

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which injury was contributed to by his own wrongful violation of law. His failure to use the highest degree of care is contributory negligence. The amendments to the instructions were proper. They but presented the idea of contributory negligence. They fixed the standard of duty as fixed by the law. The rule of the Kansas City Court of Appeals in the cases cited is wrong."

It is thus seen that the statute establishes a general rule for all persons operating automobiles upon the public roads and highways not only to protect the lives and property of others on or traveling over such roads and highways, but also to protect such drivers themselves and the persons traveling with them.

Respondent's learned counsel suggests that the statute does not apply in this case, because the telephone pole was an illegal structure in the road or highway, in that it incommoded travel and was nine feet south of the north line of the road, and the statute (Sec. 3326, R. S. 1909) only authorizes telephone companies to set their poles in the roads and streets "in such manner as not to incommode the public in the use of such roads." Without deciding whether, under the evidence, the defendant's pole was illegally in the road or did "incommode the public in the use of such road" within the proper meaning of the statute, we think this distinction is not tenable, because the automobile statute was intended to protect the drivers of such automobiles from injuring themselves or others without regard to whether they were injured by running into an obstruction or property of others which was in the road lawfully or otherwise.

We must, therefore, rule that the Automobile Statutes of 1911 applied to the plaintiff in this case, and that if he failed to exercise the high degree of care required by that statute in driving his machine he was guilty of contributory negligence.

II. The next question is whether the plaintiff was, as a matter of law, guilty of such contributory negli-

gence. Ordinary care is such care as would ordinarily be exercised by an ordinarily careful person under the same or similar circumstances. If the employment is a dangerous and hazardous one, ordinary care would require an ordinarily careful person to exercise a correspondingly greater degree of care to avoid injury to himself or others. But the Legislature in and by said statute has gone beyond the requirement of ordinary care on the part of drivers of automobiles on our streets and highways by providing that they shall exercise the *highest* degree of care, which would be used—not by an *ordinarily* careful person—but by a *very* careful person under like or similar circumstances. The automobile is not of itself a necessarily dangerous agency, like an animal *feræ naturæ*, so that it cannot lawfully be driven on a highway, nor is it a Juggernaut purposely constructed to crush out the lives of men, but by reason of its great weight and power with which it may be propelled, it becomes exceedingly dangerous to the lives and limbs of others on the highways and to the driver and occupants of the car, unless the highest care and caution is used by the driver. An automobile will not keep in the road, nor guide nor drive itself, as will, to a degree, a well-broken team of horses. The driver of an automobile must depend wholly upon himself and his own care, skill and caution to guide his car safely. All persons are not qualified to run an automobile. It would be the greatest carelessness for a wholly inexperienced person without previous instructions from competent persons to undertake to do so. It requires not only theoretical knowledge of how to manipulate the various parts of the machinery, but practical experience in so doing, to render a person competent to drive an automobile. There is no doubt these considerations were in the mind of the Legislature when the statute of 1911 was enacted. Under this statute, if all the circumstances considered, reasonable men might honestly differ as to whether the driver exercised the highest degree of care of a very careful person, then the question of his contributory

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negligence is for the jury. But, if his failure to exercise *the highest* degree of care of a *very* careful person is apparent to all reasonable men from the undisputed facts shown by the plaintiff's own testimony, then it is the duty of the court to so declare as a matter of law. [Monroe v. Chicago & Alton Railroad Co., 280 Mo. 483.] In the case before us, it was not only broad daylight, but there were no other vehicles or pedestrians in the road. The road was well graded, practically level, except where it sloped toward the ditches on each side. It was in the open country, with no buildings or other objects to obscure or distract the plaintiff's view. The plaintiff was perfectly familiar with the road, having traveled it for many years before the accident. Although he had had his machine for but twenty-three days and was evidently somewhat inexperienced and not an expert in handling it, he had during that period at different times crossed the same culvert and made the same turn in the road without any difficulty. The main or generally traveled portion of the road was smooth and dry and of abundant width to drive and turn on safely and without inconvenience. On this occasion plaintiff says he was traveling from twelve to fifteen miles an hour and drove in the center or most traveled portion of the road until just as he was approaching the turn, when he guided his car to the right *a greater distance than usual*, and then in turning to the left got on to rough ground or hard gumbo clods which caused his car to jump and skid and become unmanageable, and for that reason he could not guide it away from the (guy) telephone pole on the north side of the road near the gutter, so as to avoid striking it.

The pole was thirty or forty feet west of the west end of the culvert. The culvert ran diagonally from southwest to northeast. Plaintiff's car commenced to skid when its rear wheels left the culvert, which must have been fully thirty or forty feet from the pole as he crossed the culvert east of the center. At one place plaintiff says he was going twelve to fifteen miles

per hour when he hit the pole. At any rate, he hit the pole with considerable force and his car was still skidding, but not quite so badly as it had been, although he had turned the power off before crossing the culvert.

The statute (Paragraph 3 of Section 8 of the Automobile Act, Laws 1911, p. 327) did not require the plaintiff to pass to the right of the center in approaching the turn in the highway, as he did; that section only makes such requirement when a person operating a motor vehicle shall meet in a public highway another person riding or driving a horse or another vehicle. [Lovejoy v. Dolan, 64 Mass. 496.] In this case, there were no other persons or vehicles upon the road, and the plaintiff had the right to use the center or left side of the road, and had no reason to drive his machine out of the beaten path to the right over the rougher ground and clods. He frankly says there was no occasion nor necessity for his doing so, but he did so in order to practice keeping to the right-hand side of the road, as he had been instructed to do. He was learning to drive his car in so doing. He also says that if he had kept in the middle or smooth part of the road, he would not have struck the pole. If turning a corner in the road over rough ground or hard clods will cause a car to skid, then it is self-evident that a *very careful* person with no more experience than was had by the plaintiff, using the highest degree of care, would not unnecessarily—when there was no occasion at all for doing it—leave the smooth and beaten track and drive over such rough ground or clods in making such turn. It will not avail the plaintiff to say that the evidence does not show that he knew that cars would skid in turning on rough ground or clods, such as he encountered. A *very careful* person exercising the highest degree of care, venturing to drive a car upon the public highway at such speed as to skid with the power off 30 or 40 feet over dry clods or rough ground as did the plaintiff, would before so doing, at least, inform himself as to the common conditions and places in the



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road which may cause cars to skid. In this case, the evidence shows, and it is well known, that cars will skid in making a turn on rough ground or hard clods—a very common condition to be found on our country roads.

In the Monroe Case, *supra*, it is ruled that the statute “does not mean the highest degree of prudence or skill which could be conceived as possible to man. They are only held to the *highest degree which has been demonstrated to be practicable*.” It obviously was practicable for the plaintiff to keep in the middle of the road, where it was smooth and generally traveled by the public, and not voluntarily leave it for experimental purposes only and drive over rough ground or clods and thereby cause his car to skid and become unmanageable and collide with the pole. Even old Dobbin, when he was the mighty master of the highway, would have followed the beaten path and kept out of trouble, for, as stated by plaintiff’s learned counsel, plaintiff “had traveled over that road for years; but previous to getting his Ford car, we can assume his horses followed the beaten path, so that the guy or stub pole had never been brought to his attention.”

The plaintiff’s violation of the statute is clear and constituted contributory negligence. That such negligence contributed to his injury is beyond question. We hold, therefore, the lower court erred in refusing defendant’s demurrer to the evidence. The judgment of the lower court is reversed. *Brown and Ragland, CC.*, concur.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur; *Blair, P. J.*, in result.

## ARTHUR H. BYERS, Appellant, v. ESSEX INVESTMENT COMPANY.

Division One, March 2, 1920.

1. **AGREED STATEMENT: Omissions and Ambiguities.** An agreed statement of facts upon which the case is submitted to the jury stands in lieu of a special verdict, and if it contain any ambiguity, or any fact necessary to a recovery is omitted, a judgment for defendant will on appeal be affirmed.
2. **LEASE: Liability of Landlord: Negligent Construction.** A landlord, under no obligation, legal or contractual, to make repairs, who nevertheless undertakes to make repairs and negligently creates a defect or danger whereby the tenant, himself in the exercise of due care, is injured, is liable in damages; but if the agreed statement shows no negligence in workmanship or in the selection of materials, or whether the section of the porch railing which gave way when plaintiff's wife leaned against it was at the time in the same condition it stood immediately after being repaired, there can be no recovery. The mere fact that the railing was not replaced by new timber does not prove negligence.
3. ———: ———: ———: **Res Ipsa Loquitur: Agreed Statement.** If the petition pleads specific negligence, reliance upon the doctrine of *res ipsa loquitur* is thereby excluded; and a statement of facts agreed upon for the purpose of obviating the introduction of evidence does not alter the rule, for such an agreed statement is not an agreed case under the statute or at common law.
4. ———: ———: ———: **Application to Situation.** The basis of the presumption inherent in the rule of *res ipsa loquitur* is the doctrine of probabilities. There is no such probability that the breaking of a wooden porch railing, which gave way when plaintiff's wife leaned against it, was due to negligence in repairing it ten months previously, as to justify an application of the rule, there being no showing that the part which gave way was repaired.
5. ———: ———: ———: ———: **Peculiar Knowledge: Voluntary Act.** The rule of *res ipsa loquitur* as establishing negligence on the part of the landlord does not apply where the cause of the fall of plaintiff's wife from the porch was not peculiarly within the knowledge of the landlord and peculiarly beyond that of plaintiff. Nor does it apply if the voluntary act of plaintiff's wife was immediately connected with her fall.

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Appeal from St. Louis City Circuit Court.—*Hon. Thos. C. Hennings*, Judge.

**AFFIRMED.**

*M. D. Mugan and F. X. O'Brien* for appellant.

(1) A landlord may be under no obligation to make repairs on the demised premises, but if he undertakes nevertheless to make repairs, and the same are negligently made, he is responsible in damages for the injuries resulting therefrom. 1 Tiffany on Landlord & Tenant, pp. 660, 649; *Finer v. Nichols*, 158 Mo. App. 539; *Little v. McAdaras*, 38 Mo. App. 187; 2 McAdam on Landlord & Tenant, p. 1613; 2 Kent (14 Ed.), p. 570; *Mitchell v. Plautt*, 31 Ill. App. 149; *Mann v. Fuller*, 63 Kan. 664; *Gregor v. Cady*, 82 Me. 131; *Gill v. Middleton*, 105 Mass. 477. (2) Whether the landlord is bound to repair his leased or demised premises or not, if he undertakes to make repairs, and the work of repair is done unskillfully or negligently, he is liable in damages to his tenant, to a subtenant and to all other persons rightfully on the premises by invitation or otherwise, for injuries arising therefrom. *Grant v. Tomlinson*, 138 Mo. App. 222; *Hardt v. Koenig*, 137 Mo. App. 589; 1 Tiffany on Landlord & Tenant, p. 649, sec. 96. (3) The circumstances attendant upon an accident are sometimes of such a character as to justify the jury in inferring negligence as the cause of the accident, in conformity with the maxim and under the doctrine of *res ipsa loquitur*. 34 Cyc. 1665; *Blanton v. Dold*, 109 Mo. 64; *Ash v. Woodward*, 199 S. W. 994, 997; *Bryne v. Boston Woven Hose Co.*, 191 Mass. 40; *Mooney v. Lumber Co.*, 154 Mass. 407; 29 Cyc. 590, 623; *Ryan v. Fall River Iron Works Co.*, 200 Mass. 188; *Mullen v. St. John*, 57 N. Y. 567; *Volkmer v. M. R. Co.*, 134 N. Y. 418; *Judson v. Giant Powder Co.*, 107 Cal. 549; *Chaperon v. Portland Electric Co.*, 41 Ore. 39. (4) The doctrine of *res ipsa loquitur* is not limited to any particular class of cases. *Thompson on Negligence*, sec. 3885. (5) Under the doc-

trine of *res ipsa loquitur*, negligence will be presumed where the accident and injury are caused by an act which, in the ordinary course of things, would not have resulted in injury, if due care had been used in its performance. *Schuler v. Omaha R. Co.*, 87 Mo. App. 618; *Moore v. Parker*, 91 N. C. 275. (6) Where the defendant owes the duty to plaintiff to use due care, and the thing causing the accident is shown to be under the management of the defendant or his servants, and the accident is such that, in the ordinary course of things, does not occur if those who have the management or control use proper care, the happening of the accident, in the absence of evidence to the contrary, is evidence that it arose from the lack of requisite care. *Kahn v. Trist-Rosenberg Cap. Co.*, 139 Cal. 340; *Bevis v. Baltimore R. Co.*, 26 Mo. App. 19; *Cyclopedia of Law and Procedure*, 29 Cyc. 591; *Davis v. Baltimore R. Co.*, 26 Mo. App. 19; *Armour v. Golwoska*, 95 Ill. App. 492; *Kahn v. Burett*, 42 Misc. (N. Y.) 541, 543; *Griffin v. Manice*, 166 N. Y. 188. (7) The maxim *res ipsa loquitur* was originally limited to cases of absolute duty or an obligation practically amounting to that of insurer under a contractual relation, but has been extended to actions sounding in tort, where no contractual relation existed, so that when the physical facts of an accident themselves create a reasonable probability that it results from negligence, the physical facts are themselves evidential and furnish what the law terms "evidence of negligence" in conformity with the maxim *res ipsa loquitur*. 29 Cyc. 591, 592; *Chenall-Palmer Brick Co., v. Ratteree*, 57 Ark. 429; *Houston v. Brush*, 66 Vt. 331.

*Percy Werner* for respondent.

(1) The agreed statement of facts stands in lieu of a special verdict. If there is any omission of facts necessary to a recovery, no judgment can be based thereon. *City of Stanberry v. Jordan*, 145 Mo. 372; *Folk v. St. Louis*, 250 Mo. 138; *Isenberg v. Anchor Line*, 13 Mo. App. 415. (2) This is not a *res ipsa loquitur* case. The situation is susceptible of proof. *Patton v. Public Serv-*

ice Ry. Co., 227 Fed. 810. (3) No obligation to repair rests on the landlord, in the absence of an agreement. *Vai v. Weld*, 17 Mo. 232; *Peterson v. Smart*, 70 Mo. 234; *Ward v. Fagan*, 101 Mo. 669. (4) The landlord is not liable for injuries to sub-tenants of his lessee arising from the defective condition of premises—certainly not for anything less than a nuisance, which is not pleaded here. *Quay v. Lucas*, 25 Mo. App. 4; *Peterson v. Smart*, 70 Mo. 34; *Saretsky v. Steinberg*, 133 N. Y. S. 925; *Thomas v. Lane*, 221 Mass. 447; *Malone v. Laskey*, 2 K. B. 141. (5) Where an injury is occasioned by want of due care and skill in doing what one has promised to do, an action can only be maintained in favor of the party relying on such promise and injured by breach of it. Consequently there can be no recovery in this case for a double reason: first, because the promise was not made to plaintiff; second, because the repairs were made before plaintiff entered upon his tenancy. (*Glenn v. Hill*, 210 Mo. 298. (6) Plaintiff, not being entitled to recover for breach of contract to repair, because not privy to contract, must sue in tort. Here he cannot recover as for mere negligence in the making of repairs. (a) Because the repairs were made before plaintiff entered on his tenancy. *Quay v. Lucas*, 25 Mo. App. 407; *Stuerger v. Van Sicklen*, 132 N. Y. 499; *Ahern v. Steele*, 115 N. Y. 203; *Brady v. Klein*, 133 Mo. 422. (b) Because there is no evidence that the defendant knew of the defective condition. *Whiteley v. McLaughlin*, 183 Mo. 160. (c) There can be no recovery as for maintenance of a nuisance, first, because it is not pleaded; second, because it was not in fact a nuisance. (d) There is no evidence of negligence on the part of respondent.

BLAIR, P. J.—Appellant and his wife occupied rooms on the second floor of a building owned by respondent. The wife fell from the balcony and died as a result of her injuries. This is an action by the husband for damages for her death. The fall resulted from a breaking of a railing against which deceased leaned.

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Byers v. Essex Inv. Co.

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The petition charges, among other things, that: "Said defendant corporation, at some time during the summer and before the 15th day of November, 1915, by and through its agents and employees, made repairs on the said barrier, balustrade or railing that surmounts and partially surrounds the said balcony, but did the work of repair in such a negligent and careless manner that the said balcony and the said barrier, balustrade or railing was left in, and remained in, a weak, defective and insecure condition, dangerous to people who had occasion to use and occupy said balcony. Plaintiff states further that the said Mrs. Ruby Byers, the wife of plaintiff, while lawfully on said balcony, on the 21st day of June, 1916, and within less than six months before the filing of this suit, and while in the exercise of reasonable care for her own safety, was caused to fall and be thrown from said balcony on to and against the brick pavement on the ground below, by the breaking away of the weak, defective, insecure and dangerous barrier, balustrade or railing aforesaid, and to suffer" injuries which caused her death.

The case was submitted on an agreed statement of facts, which is as follows:

"1. Plaintiff was the husband of Mrs. Ruby Byers; that the said Ruby Byers came to her death on or about the 28th day of June, 1916, by reason of falling from a second story porch of a residence at No. 1609 Olive Street, in the City of St. Louis, on or about the 21st day of June, 1916, and about 3:15 p. m.; that at the time of the said occurrence the said Mrs. Ruby Byers had gone from her apartment out onto the said porch with an ordinary-sized Pet milk-can, and went to the railing near the northeast corner of said porch on the eastern side thereof with the intention of throwing said can out onto a garbage pile in the yard below, and that, leaning against the top rail of said porch, the section of said rail at said north end of the porch gave way and broke, allowing her to be precipitated to the ground below, a distance of about fifteen feet, from which she sustained injuries which resulted in her death.

"2. Plaintiff was a month-to-month tenant of one John Trundle, the lessee of said building under written lease from the owner thereof, the defendant in this action. Copy of said lease is hereto attached and made part hereof and marked 'Exhibit 1.' The said lease was in full force and effect at the time of said accident, except as to a modification thereof with respect to the use of the third story thereof and the amount of the rental, which modification was in writing and is likewise attached hereto, and marked 'Exhibit 2.' Attached hereto, marked 'Exhibit 3,' is a plat of the second floor of said residence, room No. 6, as shown thereon, being the room rented by Trundle to plaintiff, and the diagram also showing the balcony in question. The railing on the eastern edge of said balcony was in five sections of about seven feet each. The defendant had made certain repairs to the said railing during the month of August, 1915, but the top rail of the particular section that broke and allowed plaintiff's wife to fall to the ground was not replaced at said time by new timber. Defendant had knowledge of the fact that it was to be used as a rooming house when it leased the premises to Trundle.

"3. Plaintiff entered upon his sub-tenancy under Trundle and moved into said Apartment No. 6 on the 13th day of November, 1915, and continued a month-to-month tenant of the said Trundle down to the time of the accident in June, 1916. No further or other repairs were made to said porch subsequent to August, 1915.

"4. Plaintiff's wife was at the time of her death thirty-seven years of age and in reasonably good state of health, and kept house for the plaintiff. There were no children by the marriage of plaintiff to the deceased.

"5. None of the admissions herein contained are in any wise to affect either party, or to be regarded as made, except for the purpose of the submission of this controversy."

The lease referred to in the agreed statement of facts is dated March 1, 1915. By it respondent leased to John Trundle the property in question. By its terms

the lease expired February 28, 1917. It provides that the property is to be used as a "dwelling" and the lease "shall not be assigned, nor shall said premises, or any part thereof, be let or underlet, or used or permitted to be used, for any purpose other than above provided, without the written consent of the lessor first endorsed herein;" and further provides that "the lessee agrees to surrender said premises at the end of said term in as good condition as received, ordinary wear and tear excepted; all repairs to the demised premises shall be done by the lessee."

I. The agreed statement "stands in lieu of a special verdict" and "if there be any ambiguity" or "any omission of facts necessary to a recovery," the judgment for respondent was right and should be affirmed. [City of Stanberry v. Jordan, 145 Mo. l. c. 382, and cases cited.]

II. It is conceded respondent was under no obligation, legal or contractual, to repair (Kohnle v. Paxton, 268 Mo. l. c. 471, et seq.), but it is contended that he undertook to repair in August, 1915, and is liable because the repairs were then negligently made.

**Liability  
for Repairs.**

The rule invoked is that when the landlord, whether obligated so to do or not, undertakes to repair and thereby negligently creates a defect or danger whereby the tenant, himself in the exercise of due care, is injured, the landlord is liable. [Tiffany on Landlord and Tenant, vol. 1, sec. 97; Grant v. Tomlinson, 138 Mo. App. l. c. 228; Finer v. Nichols, 158 Mo. App. l. c. 545, 175 Mo. App. l. c. 537, et seq.; Gill v. Middleton, 105 Mass. 478.] The facts in the agreed statement pertinent to this question are: "The railing on the eastern edge of said balcony was in five sections of about seven feet each. The defendant had made certain repairs to the said railing during the month of August, 1915, but the top rail of the particular section that broke and allowed



plaintiff's wife to fall to the ground was not replaced at said time by new timber." Plaintiff, as tenant under respondent's lessee, moved in November 13, 1915. The injury occurred in June, 1916. "No further or other repairs were made to said porch subsequent to August, 1915." Deceased leaned against the top rail "of said porch," it gave way and she fell.

The agreed statement does not state facts which show any negligence in workmanship, or in the selection of material. It does not show whether the section which fell was in the same condition in which it stood immediately after being repaired. Nor is it stated that the rail which broke was in any way defective. The mere fact that this rail was not replaced by new timber does not prove negligence. Under the applicable test (par. 1, *supra*) the judgment must be affirmed on these grounds unless appellant's next point is well taken.

III. It is contended the doctrine *res ipsa loquitur* applies.

(a) The agreed statement of facts in this case is a method chosen by counsel to obviate the necessity of adducing evidence *pro* and *con*. While it binds the parties, it is not an agreed case under the statute (Sec. 2117, R. S. 1909) "or at common law" (State ex **Res Ipsa** rel. v. Merriam, 159 Mo. 655) and the plead- **Loquitur.** ings are left to perform their usual functions. The petition pleads specific negligence and thus excludes reliance upon the doctrine of *res ipsa loquitur*. [Roscoe v. Met. Street Ry. Co., 202 Mo. l. c. 587, et seq.]

(b) Further, the doctrine invoked has no application to the facts. The basis of this presumption is the doctrine of probabilities. There is no such probability that the breaking of a wooden railing ten months after its repair is due to negligence in the act of repairing as to justify the application of the rule. The agreed statement does not show a repairing of the rail section which gave way. The facts are not such as to bespeak the only negligence for which respondent could be held liable. The cause of deceased's fall is not peculiarly with re-

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spondent's knowledge and peculiarly beyond that of appellant. Further, the voluntary act of the deceased was immediately connected with the injury. [Carter v. Railroad, 177 Mass. 228; Penn. Co. v. Marion, 104 Ind. 239.] For these and other reasons the doctrine invoked does not apply.

IV. Other arguments are advanced by respondent to support the judgment. Among other things it questions the rights of the sub-lessee to complain in view of the prohibition in the lease. [Cole v. McKey, 66 Wis. 500.] The reasons already given dispose of the case.

The judgment is affirmed. All concur.

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CLARENCE L. HARELSON, Appellant, v. BENJAMIN F. TYLER et al.

Division One, March 2, 1920.

1. **DEMURRER: Admissions.** A general demurrer to a petition admits all facts well pleaded, but it does not admit allegations which are mere conclusions of the pleader.
2. **——: Refusal to Plead Further: Judgment: Appellate Practice.** Where defendants interposed a general demurrer to the petition, which the court sustained, and, upon plaintiff's declining to plead further, entered judgment on the demurrer, the only question for consideration upon an appeal by plaintiff is the sufficiency of the petition, and if it states a cause of action, either under the statute or at common law, the judgment will be reversed, but otherwise it will be affirmed.
3. **COMBINATION: Uniform Charges for Personal Services: Statute.** An agreement by a voluntary association of men engaged in the same business whereby they bind themselves to charge uniform rates for personal services in buying and selling hay on commission is not within the prohibitions of the statutes against trusts and combinations in restraint of trade, for the reason that labor, whether physical or intellectual, is not by any fair rule of construction a "product or commodity" that is the subject of "importation, transportation, manufacture, purchase or sale" within the meaning of those words as used in the statute.

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4. ———: ———: ———: **Competition: Restraint of Trade.** Notwithstanding the voluntary association was organized for the purpose of fixing, controlling and stabilizing the commission charges and brokerage fees of its members for buying and selling hay on a certain market, and minimizing competition in respect thereto, yet if nothing in the agreement directly or necessarily tends to a restraint of the trade, or is calculated to limit the quantity or to fix, regulate or control the price of the commodity or to lessen competition in the business of buying or selling it, the association is not a combination condemned by the statute.
5. ———: ———: **Inhibiting Dealings With Expelled Members.** A provision in the articles of association of a voluntary association, formed for the purpose of stabilizing the fees and commissions which its members may charge for buying and selling hay on a certain market, which debars them from trading with persons who have been suspended or expelled from membership for violating its rules, cannot, except incidentally and indirectly, affect the price which the producer receives for his commodity, and does not bring the association under the condemnation of the statute.
6. ———: **At Common Law: Civil Conspiracy: Definition.** A civil conspiracy is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened.
7. ———: ———: ———: **Uniform Commissions: Oppression.** Agreements and conduct by a voluntary association of commission merchants which evidence merely a purpose to enforce and maintain fixed and uniform commissions and charges for buying and selling hay on a certain market do not amount to a civil conspiracy; but where the articles of association and by-laws provided that all contracts of a firm having a member of the association were subject to its rules, and plaintiff's partner was a member, and a month after the dissolution of the firm the partner was expelled for failure to pay a fine previously assessed, and the firm itself had not violated the rules or been penalized, the association could not, upon the pretext that plaintiff was expelled from membership privileges, bar him from all business intercourse with the members of the association, and thereby oppressively destroy his business of buying and selling hay in the market and in effect drive him from the market; such conduct, under the common law, amounts to a civil conspiracy.

Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney*, Judge.

REVERSED AND REMANDED.

*L. C. Boyle, A. E. Watson, and Thomson, Dew & Brasher* for appellant.

The court below erred in sustaining the demurrer of defendants to the petition of the plaintiff. *Co-operative Livestock Commission Co. v. Browning*, 260 Mo. 324; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280; *Lowe's Patent Door Co. v. Fuelle*, 215 Mo. 421.

*John T. Barker*, for respondents.

(1) The court properly sustained defendant's demurrer. The Kansas City Hay Dealers Association is legally organized and does not violate the Anti-Trust Laws of Missouri. *Commission Co. v. Browning*, 260 Mo. 324; *Gladish v. Stock Exchange*, 113 Mo. App. 726; *Anderson v. United States*, 171 U. S. 604; *State v. Duluth Bd. of Trade*, 23 L. R. A. (N. S.) 1260; *Bottlers Assn. v. Fennentry*, 81 Mo. App. 533; *Hunt v. Club*, 140 Mich. 538; *Fowle v. Park*, 131 U. S. 88; *Hopkins v. United States*, 171 U. S. 578; *Mathews v. Associated Press*, 136 N. Y. 333; *Comm. Co. v. Live St. Ex.*, 143 Ill. 210; *Warren v. Tobacco Exch.*, 55 S. W. 912; *Haepler v. N. Y. Ex.*, 149 N. Y. 414; *Belton v. Hatch*, 109 N. Y. 593; *Comm. Co. v. Spencer*, 215 Mo. 105; *Whitwell v. Tobacco Co.*, 125 Fed. 454, 64 L. R. A. 689; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179; *Noyes on Intercompany Relations* (2 Ed), sec. 395; *Stk. Yds. Co. v. Mallory*, 157 Ill. 554; *State v. Chamber of Commerce*, 47 Wis. 670; *Grain Ex. v. Bd. of Trade*, 15 Fed. 847; *Railroad v. Stk. Yds. Co.*, 45 N. J. Eq. 50. (2) Plaintiff's petition follows the petition in the case of *Commission Co. v. Browning*, 260 Mo. 324, and under the authority of that case must fail. *Gladish v. Stk. Ex.*, 113 Mo. App. 726; *Anderson v. United States*, 171 U. S. 604. (3) Plaintiff's petition alleges a violation of the Anti-Trust Laws of Missouri. He is now trying to re-

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cover under the common law. This he cannot do. Having based his action on the statutes, he cannot recover under the common law. *Mathieson v. Railroad*, 219 Mo. 542; *Madden v. Railroad*, 167 Mo. App. 143; *Ham v. Railroad*, 149 Mo. App. 200; *Comm. Co. v. Browning*, 260 Mo. 324.

RAGLAND, C.—This action was commenced in the Circuit Court for Jackson County, at Kansas City. The petition, omitting formal parts, is as follows:

“For his cause of action plaintiff states that the Kansas City Hay Dealers’ Association of Kansas City, Missouri, is a voluntary association composed of certain persons engaged in the hay business in Kansas City, Missouri, and that the defendants, with others, are members and officers thereof; that said association is a powerful organization, and that the members thereof control the far greater amount of all the hay business transacted on the Kansas City market, which market is the largest hay market in the world; that said Kansas City Hay Dealers’ Association is contrived and intended and designed to create, for and in behalf of the members thereof in that particular line of industry, a monopoly to restrain and stifle competition in the importation, transportation, manufacture, purchase and sale of hay on the Kansas City market and to regulate, control and fix the price of hay; to fix and maintain by agreement among its members, and rules passed by said association and by the use of arbitrary methods, the price to be paid as commission for handling hay on the Kansas City market; to hinder and prevent persons and corporations engaged in the hay business on the Kansas City market and to hinder and prevent this plaintiff in carrying on the business of buying, selling, receiving and shipping hay on this market.

“Plaintiff further says that said association has a constitution, by-laws and regulations, which constitution, by-laws and regulations are agreed upon by the members, reduced to writing and printed in a book or pamphlet entitled ‘Constitution, By-Laws and Regulations of the Kansas City Hay Dealers’ Association of Kansas

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City, Missouri,' which constitution, by-laws and regulations constitute a contract among the members of said association, which said contract is unlawful, illegal and violative of the statutes of Missouri relating to pools, trusts, conspiracies, discriminations, and boycotts, as herein-after set forth; that said association employs men for the purpose of plugging, weighing and watching cars of hay arriving in Kansas City for sale on the Kansas City market; that each of the members of said association are assessed certain fees monthly for the payment of the men employed as pluggers, watchmen and weighers; that it is the rule and custom of such association to render bills for such dues and fees to its members each month; that Section 16 of Article 6 of the above mentioned constitution, by-laws and regulations provides as follows, to-wit:

“‘Sec. 16. Whenever assessments are made on bills rendered for indebtedness to this association, they shall be considered due and shall be delinquent after thirty days from date, and the said act of delinquency automatically suspends the member for neglecting or refusing to pay the same from all the privileges of this association until paid. Failure to pay any assessment or indebtedness to this association for a term of one year from the date of said assessment or bill, shall of itself operate as a forfeiture and cancellation of the membership of such member and of all property and other rights and privileges thereunder. Suspended members are not relieved of the payment of any assessment or bill and the payment of any assessment or bill by members while under suspension shall not be construed as in any way affecting such suspension.’

“Plaintiff further says that Sections 4, 5, 6, (a), (b), (c), (d), Section 7, and Section 8, which said sections constitute an unlawful agreement to regulate, control and fix the price and tend to regulate, control and fix the price of hay, are as follows, to-wit:

“‘Sec. 4. The commission for selling incoming hay of any description shall be seventy-five cents per

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ton, with no minimum charge. The commission for selling incoming wheat or oats straw shall be fifty cents per ton, with a minimum charge of five dollars on any car containing twenty thousand pounds or less.

“‘Sec. 5. The commission for buying and shipping outgoing hay of any description shall be seventy-five cents per ton, with no minimum charge. The commission for buying and shipping outgoing wheat or oats straw shall be fifty cents per ton, with a minimum charge of five dollars for any car containing twenty thousand pounds or less.

“‘Sec. 6. (2) A broker is defined as a member who sells inbound hay or straw on the Kansas City market for another member actively engaged in the hay business in Kansas City, or a member who buys hay or straw on the Kansas City market for any individual, firm or corporation, where the names of the principals are announced on making the contract, and the broker at no stage of the transaction becomes the actual owner of the property, or a member looking after hay or straw shipped to the Kansas City market for sale or inspection and afterwards it is reconsigned to other destination.

“‘(b) A brokerage of one dollar per car may be charged where members sell another member's incoming hay or straw on the Kansas City market, giving up the names of the principals at the time of trade, provided that members are prohibited from acting as brokers for selling inbound hay or straw for non-resident members or non-members.

“‘(c) A brokerage of one dollar per car shall be charged for buying hay or straw on the Kansas City market where the member gives up the names of the principals at the time of the trade, and the principals furnish substantial proof that all bills will be paid according to contract.

“‘(d) A brokerage of one dollar per car shall be charged for receiving hay for the purpose of having the same inspected at Kansas City and reconsigning it to other markets. The shipper paying the inspection, watchman, plugging and reconsigning charges.

“Sec. 7. Every member of this association, and every person, firm or corporation admitted to trade or to do business therein who shall charge less than the regular rates of commission or brokerage established by the rules of this association, or shall assume or rebate any portion of the same, or shall, with intent to evade in any way, directly or indirectly, the regular rates of commission or brokerage established by the rules of this association, purchase, or offer them, or it, for sale; or shall, with intent to cut or evade in any way, directly or indirectly, the regular rates of commission and brokerage established by the rules of this association; or shall make or report any false or fictitious sales or purchases; or shall resort to any method of accounting, directly or indirectly, in violation of or contrary in purpose and effect to a strict adherence to the regular established rates of commission and brokerage of this association; directly or indirectly buy or give, or offer so to do, any money or other consideration of whatsoever nature to any person to procure or influence shipments or consignments of hay or straw in any form, or shall, with intent to cut or evade in any way, directly or indirectly, the regular rates of commission and brokerage established by the rules of this association, make use of any shift or device whatsoever, shall be deemed guilty of violating the rules of this association establishing rates of commission and brokerage, and on conviction thereof shall be fined by the association in the sum of one hundred dollars, fifty dollars of which shall be paid to the person furnishing the evidence upon which the conviction is had. This rule shall not prevent the regular employment by members of this association of traveling men, but shall prohibit a division of commission with such traveling men who are not members of this association.

“Sec. 8. All contracts of a member of this association, or a firm having a member of this association as a general partner, or a corporation having a membership representation with any other member of this association as a general partner, or any other corporation



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having membership representation for the purchase and sale of hay or straw, or transactions incident to the hay and straw business proper, are contracts subject to the rules of this association.'

"Plaintiff further says that on and prior to the 21st day of October, 1916, he was a copartner with one H. S. Nicoll, engaged in the hay business in Kansas City, Missouri, under the name of the Southwestern Hay & Grain Company; that the said H. S. Nicoll was a member of the said association; that on the 21st day of October, 1916, this plaintiff and the said H. S. Nicoll dissolved said partnership; that thereafter, namely, on the 1st day of November, 1916, the said H. S. Nicoll was automatically suspended from said association under Section 16 of Article 6 of said constitution, by-laws, and regulations for the nonpayment of the sum of \$40.85 due said association for weighing, watchmen and Plugging fees for the month of September, 1916.

"Plaintiff further says that said association did on the 14th day of September, 1915, pass an amendment to the constitution, by-laws, rules and regulations, of said association, which thereby became a contract between the members thereof and which is as follows:

" 'Sec. 36. Every member of this association and every individual, firm or corporation admitted to trade or do business therein, who shall have any business dealings, or relations pertaining to the purchasing or selling of hay or straw at Kansas City with any individual, firm or corporation who is under suspension from membership, or who has been expelled therefrom because of a violation of any of the provisions of the constitution, by-laws, rules and regulations of the association, after notice of such suspension, or expulsion, shall have been issued by the secretary, shall be fined ten dollars for each and every ear, or part thereof, so purchased or sold.'

"That said by-law constitutes an unlawful, illegal and wrongful contract between the defendants and the members of said association; that the officers and members of such association did, on and after the 1st day of November, 1916, wrongfully, illegally and unlawfully,

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with intent to hinder and prevent plaintiff from transacting business on the hay market at Kansas City, Missouri, maintain that said plaintiff was suspended from membership in said association by reason of his former association with said Nicoll, and that under and by virtue of the above-quoted amendment, Section 36, no other member of the association could deal or trade with him, the said plaintiff; that the said plaintiff was desirous of continuing in the business of buying, selling, receiving and shipping hay in Kansas City, Missouri, which was his calling, occupation and business, and the only one in which he was experienced, and many of the members of said association were anxious to deal with him in such business, but such members were afraid to do so for fear of the fine provided in the last above-named section; that one member of the association did deal with plaintiff and after November 1, 1916, was fined therefor in the sum of \$640 by the said association; that another member of said association was fined ten dollars by said association for a similar alleged offense, and that the officers of said association made threats to fine other members of said association who had or were about to deal or transact business with the plaintiff in his said business, calling or avocation; that said members, by reason of said constitution, by-laws and regulations and agreements, and by reason of said threats, were intimidated and prevented from having any business dealings with the said C. L. Harelson.

"Plaintiff further says that he was, during the months of November and December, 1916, engaged in reorganizing his said business with a view of continuing in and carrying on the hay business in Kansas City, Missouri; that his list of customers and his acquaintance among the hay and grain trade in the territory adjacent, tributary to and including Kansas City, Missouri, was of great value and as a basis for the prosecution of the hay business in said territory, together with his long experience in said business, was worth at least twenty-five thousand dollars; that in said business he had in the past transacted large amounts of business,

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sometimes being as great as five hundred cars of hay or straw in a month and making an aggregate yearly amount of two hundred and fifty to three hundred thousand dollars; that on three different occasions the defendants unlawfully confederating and conspiring together to injure and destroy the said business of the plaintiff and to prevent plaintiff from carrying out his plan of reorganization and the prosecution of his said business and enjoying the profits thereof, informed persons with whom plaintiff was negotiating for a reorganization of this business that the members of the association at Kansas City, Missouri, would not be allowed to trade with the said plaintiff or with any firm or corporation with which the plaintiff might be associated; that each of the three persons above referred to were ready, willing and able to furnish sufficient money to enable the plaintiff to reorganize and to continue to carry on his said business and to use his experience therein and his knowledge and acquaintance with customers and dealers therein; that by reason thereof said persons were intimidated and were afraid to invest their funds in the business which plaintiff was attempting to reorganize, and by reason thereof plaintiff was prevented from securing capital to continue and carry on said business and to use his experience, knowledge and acquaintance with customers and dealers aforesaid, by reason of said malicious threats and statements, and his business aforesaid was thereby largely injured and destroyed; that after the failure of the plaintiff's efforts to interest capital in his business, by reason of the malicious threats and statements aforesaid made by the said association members as aforesaid, plaintiff was employed by the Shofstall Hay & Grain Company, a corporation, at a salary of two hundred dollars per month and commissions; that shortly thereafter said association and its members, with a view to prevent the said plaintiff from working for said Shofstall Hay & Grain Company, on January 2, 1917, substituted for the above-mentioned Section 36 of Article 12 of the Constitution,

By-Laws, Rules and Regulations, the following, to be known as Section 36:

“ ‘Every member of this association and every individual, firm or corporation admitted to trade or do business therein, who shall, directly or indirectly, have any business dealings or relations pertaining to the handling of hay or straw, or shall make use of any shift, device or subterfuge, whatsoever, to nullify the intent of this rule, with any individual, firm or corporation who is under suspension from membership or who has been expelled therefrom because of a violation of any of the provisions of the constitution, by-laws, rules and regulations of the association, after notice of such suspension, or expulsion, shall have been issued by the secretary, shall, upon conviction thereof be fined by the association not less than the sum of five hundred dollars, nor more than one thousand dollars, or suspended, expelled or both, and fifty dollars shall be paid by the association to the person furnishing the evidence upon which the conviction is based.’

“That prior to the passage of said substitute Section 36, the officers of the said defendant association notified the said Shofstall Hay & Grain Company that it must cease to employ the said plaintiff, and fined C. E. Shofstall, who holds a membership in said defendant corporation and is an officer of the said Shofstall Hay & Grain Company, the sum of \$650 for having the said plaintiff in the employ of the said Shofstall Hay & Grain Company, and in consequence thereof said plaintiff was discharged from the employ of the said Shofstall Hay & Grain Company; that under and by virtue of the rules, regulations and agreements between the members of said defendant Hay Dealers’ Association as aforesaid, said plaintiff is unlawfully and illegally prevented from earning a living in his business, avocation and calling of the hay business at Kansas City, Missouri, and its adjacent business territory; that he has been in the hay business for a lifetime and is unacquainted with any other calling or avocation from which he can derive a livelihood; that he cannot go into the hay business at

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any other point in the United States and ship hay to the Kansas City market or territory; that by the illegal and unlawful acts aforesaid of the defendants, he is prevented from earning a living and his calling and occupation has been greatly injured, to the plaintiff's damage in the sum of twenty-five thousand dollars; that the defendants threaten and do continue to interfere with the business, occupation and calling of plaintiff in the manner aforesaid, and if the defendants are permitted to continue their illegal acts as aforesaid against the plaintiff's business, occupation and calling aforesaid, the same will be wholly and irretrievably destroyed and the plaintiff will thereby suffer irreparable injury and damage, and for the prevention thereof he has no adequate remedy at law and the defendants should be enjoined from further interfering with the plaintiff, his business, occupation and calling or in anywise boycotting the same.

"Wherefore plaintiff prays judgment against the defendants and each of them for treble damages, to-wit, the sum of seventy-five thousand dollars, and costs, and that a temporary injunction may be granted the plaintiff restraining and enjoining the said defendants and each of them and their successors in office, individually and as members of said Kansas City Hay Dealers' Association of Kansas City, Missouri, and as business agents of said association, their confederates, associates, agents and representatives from boycotting or making effectual, promulgating, or in anywise proclaiming any boycott upon or against the plaintiff or his business, occupation or calling, or from sending, conveying or delivering in any way to any person, firm, corporation or association any boycott notice, verbal or otherwise, upon or against the plaintiff, and from any way menacing, hindering or obstructing the plaintiff or interfering with his patronage, business or customers, and from in any way impeding the plaintiff from the fullest enjoyment of all the patronage, business and custom which he may possess, enjoy or acquire, and from interfering with the plaintiff or his business by threats to any person who

might be or become a customer or business associate of plaintiff; that said defendants or any of them will cause or prevent any person or persons whomsoever to cease business relations with any customer or business associate of plaintiff, and that at the final hearing hereof said injunction be made perpetual, and for such other and further relief as to the court may seem just, proper and equitable."

To this petition defendants interposed a general demurrer, which the court sustained. Plaintiff declining to plead further, judgment was rendered on the demurrer. From that judgment plaintiff prosecutes this appeal.

The demurrer admits all well pleaded facts. They may be summarized as follows: The defendants are officers and members of the Kansas City Hay Dealers' Association, a voluntary association, which

**Admissions.** controls the greater amount of the hay business on the Kansas City market, the largest hay market in the world. The Association was organized, in part, for the purpose of fixing and maintaining by agreement among its members the amounts to be paid as commissions and brokerage for buying, selling and handling hay on the Kansas City market. In furtherance of that object it adopted a constitution and by-laws and, among others, those hereinafter named. By Sections 4, 5, and 6 (a), (b), (c) and (d) thereof, it fixed the commissions and brokerage to be charged by its members for certain services therein enumerated and defined. By Sections 7 and 8 thereof, it provided that, if any of its members, or any person, firm or corporation, entitled to membership privileges by reason of having associated with it or them a member, charged less than the rates fixed by its rules, such member or associated member would be subject to a fine. By Section 16 thereof, if certain assessments were not paid by members within prescribed times, suspension and expulsion would automatically ensue. Section 36 thereof forbade any member, or person, firm or corporation having membership privileges, from having any business dealing, pertaining

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to the buying or selling of hay or straw at Kansas City. with any individual, firm or corporation under suspension, or who had been expelled from the Association. On October 21, 1916, and prior thereto, plaintiff was, and had been, a partner with one Nicoll, engaged in the hay business at Kansas City, under the firm name of Southwestern Hay & Grain Company. On the date last named plaintiff and Nicoll dissolved their partnership. During the continuance of the partnership Nicoll was a member of the Association, but on the first of November following its dissolution he was suspended for failure to pay assessments that became due October first preceding. After Nicoll's suspension, defendants maintained that plaintiff, on account of his former association with Nicoll, was also suspended and that no member of the Association could deal or trade with him. Thereafter, on account of fines inflicted and threatened to be inflicted by defendants on members of the Association, plaintiff was prevented from having any dealings with them in any matter pertaining to the hay business. "On three different occasions the defendants unlawfully confederating and conspiring together to injure and destroy the said business of plaintiff and to prevent plaintiff from carrying out his plan of reorganization and the prosecution of his said business and enjoying the profits thereof, informed persons with whom plaintiff was negotiating for a reorganization of this business that the members of the Association would not be allowed to trade with plaintiff or with any firm or corporation with which he might be associated." On each of these occasions, when plaintiff was about to successfully mature a plan by which he would have secured the influence and financial support of men of large capital in forming a business organization to deal in hay on the Kansas City market, he was thwarted by defendants in the manner stated. Finally, after these failures brought about by defendants, plaintiff secured employment with a hay-and-grain corporation to work on a salary and commission. An officer of the corporation was a member of the Association; defendants caused

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him to be fined on account of plaintiff's employment, and plaintiff was thereupon discharged. By reason of the aforesaid acts of the defendants, plaintiff's business, which was of the value of \$25,000, was destroyed and plaintiff was deprived of his avocation. Defendants threaten to continue such interference with plaintiff's business and calling.

The allegations to the effect, that the Association was designed and intended to create a monopoly to restrain and stifle competition in the importation, transportation, manufacture, purchase and sale of hay, and to regulate, control and fix the price thereof; that it was further designed to prevent plaintiff and others from engaging in the hay business on the Kansas City market; and that the constitution and by-laws of the Association constitute a contract among its members that is violative of the statutes of this State relating to pools, trusts, conspiracies, discrimination and boycotts, being merely conclusions of the pleader, are not admitted by the demurrer. Their soundness depends on the specific facts pleaded.

I. There was no theory of the case developed by a trial below. The only question passed on was the sufficiency of the petition, tested by general demurrer. In reviewing that ruling, it is incumbent upon us to apply the same principles that were controlling in the *Practice.* court *nisi*. If the petition states a cause of action, either under the statute or at common law, the demurrer was improvidently ruled; otherwise the judgment should be affirmed. [Railroad v. Freeman, 61 Mo. 80; Comings v. Railroad, 48 Mo. 512; Filler v. Brewing Co., 223 Fed. 313.]

II. Defendants are members of a voluntary association, and as such the petition predicates statutory liability against them because the constitution, by-laws and regulations of that association constitute, as it is alleged, an understanding or agreement of its members that amounts to a conspiracy in restraint of trade as defined by some or all of Sections 10298 to 10301,

Combination:  
Charges for  
Personal Service.



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inclusive, Revised Statutes 1909. Looking to the laws of the Association as pleaded, we find that the principal subject with which they deal, and to which all else is incidental, is that of fixing and maintaining rates of commission and brokerage to be charged by its members. So far as they disclose, the only purpose of the organization was to fix and stabilize among its members remunerative rates of compensation for their services in buying, selling and receiving and reconsigning shipments of hay and straw. Is the agreement so evidenced by the by-laws, and the combination effected thereby, within the prohibitions of the statute? We think not, for at least the following reasons: (1) The contract in question is one whereby men engaged in the same business have bound themselves to charge uniform rates for personal services, merely that and nothing more. The combination thus formed is not under the ban of the statute, for the reason, that labor, whether physical, or intellectual, or a combination of the two, is not by any fair rule of construction a "product or commodity" that is the subject of "importation, transportation, manufacture, purchase or sale" within the meaning of the words as used in the statute. [State ex rel. v. Associated Press, 159 Mo. 410; Door Co. v. Fuelle, 215 Mo. 421.] (2) While the association of which defendants are members was unquestionably organized for the purpose of fixing and controlling the rates of commissions and brokerage for the buying and selling of hay on the Kansas City market and minimizing competition in respect thereto, nothing in its by-laws or regulations directly and necessarily tends to a restraint of the trade. Nothing therein is calculated to limit the quantity or to fix, regulate or control the price, nor to lessen competition in the business of buying and selling hay and straw. There seem to be no restraints imposed with respect to the dealings of members with non-members, at least none are specifically alleged. The only inhibition of the kind that distinctly appears is the one that debars members from trading with persons who have been suspended or ex-

pelled from membership in the association for a violation of its rules. It may be said, however, that, as the commission and brokerage specified in the rules of the association are fixed charges which must be paid, the price which the producer receives for his hay may be indirectly affected thereby. But the question is whether the production or price is directly, or to any appreciable extent, controlled or regulated by a rule which makes the charges uniform instead of variable, definite and known instead of uncertain and unknown. It is probable that certainty and uniformity of the charges of the selling agent, like those of the carrier and warehouseman, would tend to encourage production and foster trade rather than the reverse, but whether it would be the one way or the other, the effect would be remote or incidental, and consequently the association, which was formed for the direct purpose of protecting and promoting the interests of its members, would not thereby be brought within the condemnation of the statute. [Door Co. v. Fuelle, supra, l. c. 474; Hopkins v. United States, 171 U. S. 593; States v. Duluth Bd. of Trade, 107 Minn. 506.]

III. Whether the petition states a cause of action at common law is next to be considered. It is apparent that the business of buying and selling hay and straw on the Kansas City market is done to so great an extent by the members of the Hay Dealers' Association, that one who is not a member would be under a great disadvantage in engaging in, or continuing in, such business, if not entirely prevented therefrom, if the members of the association declined to have any dealings with him. The question, therefore, is whether the action and conduct of defendants in excluding plaintiff from all business relations with members of the association and virtually thereby making a trade outlaw of him amounted to a conspiracy. A "civil conspiracy" is said to be a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object; or a lawful object by unlawful or oppressive means. To sustain an action,

damage must have resulted from the combination; to warrant an injunction, damage must be threatened. [National Fireproofing Co. v. Builders' Assn., 169 Fed. 259; State ex rel. v. Associated Press, supra; Walsh v. Association, 97 Mo. App. 280.] The principle which determines whether the object sought to be effected by two or more persons acting in concert is legal or illegal can not be stated more clearly than was done by the court in National Fireproofing Co. v. Builders' Assn., supra, at page 265: "The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons, to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interest of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that, when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy." Applied to the Kansas City Hay Dealers' Association, this test quite conclusively shows that the object it seeks to effect, as disclosed by its by-laws, is lawful. These rules make it obligatory upon the members,

and the business organizations with which they associate themselves for the purpose of buying and selling hay, to charge fixed rates of commission; they provide for the infliction of fines upon the members and their respective business organizations for a violation of such rates; they require the payment by members, under penalty of suspension or expulsion, of certain assessments for the support of the Association; and they forbid members from dealing with those who have been suspended or expelled from membership. All of which merely evidences a purpose to enforce and maintain fixed and uniform rates of commission to be charged by its members.

It is not easy, however, to bring within the scope of this purpose, and the means provided by the by-laws for its accomplishment, the actions of the defendants in their pursuit of the plaintiff. It does not appear that he was, or ever had been, a member of the Association. He had been a partner with one Nicoll, a member, in the Southwestern Hay & Grain Company. But that did not make plaintiff a member, *per se*, and subject to discipline by the Association. Section 8 of the by-laws provides that "all contracts . . . of a firm having a member of this association as a general partner . . . for the purchase and sale of hay . . . are contracts subject to the rules of this association." Section 7 provides that if such a firm violates the rule as to rates it shall be fined. So that, while plaintiff was a partner of Nicoll, the contracts of the firm were subject to the rules of the Association with reference to rates of commission, and the firm itself subject to a fine if it charged less than the rates fixed by them. To this extent, and to this extent only, did plaintiff ever assume any obligation to the Association by reason of his partnership with Nicoll. Now it does not appear that the Southwestern Hay & Grain Company ever violated the rules respecting rates, but after the dissolution of that firm Nicoll was suspended from membership in the association for the non-payment of assessments. These assessments had become due before the dissolution of the partnership, but they

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had been assessed against the member and not the firm, and it does not appear that plaintiff, either individually or as a former partner of Nicoll, was under any obligation to pay them. The by-law itself does not purport to penalize any one but the defaulting member. How then could plaintiff come within its condemnation? Yet, it is on the pretext that plaintiff was suspended from membership privileges, that defendants have debarred him from all business intercourse with members of the association. From the facts alleged, the inference is plain that the defendants went entirely beyond the scope of the true objects and purposes of the association, and the means that it employs for their accomplishment; and, under the pretext and color of its rules, for their own unlawful purpose of oppressing plaintiff, deprived him of all business relations with members of the association. It may be that there are other facts not disclosed by the petition that would throw an altogether different light on the conduct of defendants, but those stated, nothing further appearing, call for justification. By their concerted action, defendants destroyed plaintiff's business, and it devolves upon them to show, if they can, that the injury thus inflicted by them was merely the result of a lawful effort on their part to promote their own welfare. We are of the opinion, therefore, that the petition states a cause of action at common law.

What has been said with reference to plaintiff being a non-member of the Association should not be construed as implying that a member, after suspension or expulsion, can for all time be treated as an Ishmaelite by the other members, regardless of all other circumstances, and their conduct in so doing not amount to a conspiracy. All that we hold in this respect is that the by-laws as pleaded, if enforced in good faith solely to accomplish the primary purpose of the Association to fix and maintain for its membership uniform rates of commission and brokerage, are a lawful means for the accomplishment of such object.

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The judgment is reversed and the cause remanded to be proceeded with in conformity with the views herein expressed. *Brown* and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. *Blair, P. J.*, and *Graves* and *Goode, JJ.*, concur; *Waddson, J.*, not sitting.

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WINDHAM RICHARD HARDAWAY, Appellant, v.  
WILLIAM SHERMAN HARDAWAY.

Division One, March 2, 1920.

CONVEYANCE: Voluntary: No Consideration: Cancellation: Lien. A deed made by a grantor in full possession of his faculties and in no wise induced by undue influence or fraud, but voluntarily and of his own volition and without any agreement or promise on the part of the grantee, either directly or through others, to either pay money therefor or to support and care for the grantor in his old age, but made in pursuance of a long-cherished purpose to so dispose of the land, either by deed or will, that the grantee would own it after the grantor's death, cannot be set aside, nor can a lien be declared on the land for supposed damages.

Appeal from Polk Circuit Court.—*Hon. C. H. Skinker*, Judge.

AFFIRMED.

*J. M. Leavitt* and *Herman Pufahl* for appellant.

- (1) The fiduciary relation having been shown to exist between plaintiff and defendant, the law presumes that the deed was obtained by undue influence. *Cadwalader v. West*, 48 Mo. 483; *Kirschner v. Kirschner*, 113 Mo. 297; *Ennis v. Burnham*, 159 Mo. 518; *McDermeitt v. Keesler*, 240 Mo. 287; *Kincer v. Kincer*, 246 Mo. 419.
- (2) The deed should be set aside for failure of con-

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sideration. Respondent admits he paid nothing. His unreasonable story about paying the recited consideration of one dollar in work is too ridiculous to merit consideration. The only thing it tends to prove, is that it is not intended to be a gift of the land. The appellant testified that he received nothing and would not have executed the deed but for the fact that he expected Sherman to care for him in his old days and look after the farm, and that these promises induced him to make the deed, and that but for them he would not have executed the deed. *Haataja v. Saarenpaa*, 118 Minn. 255; *Grimmer v. Carleton*, 93 Cal. 189; *Lane v. Lane*, 106 Ky. 530; *Jenkins v. Jenkins*, 3 B. Mon. 237; *Reynolds v. Reynolds*, 234 Mo. 155. (3) The refusal or neglect of the grantee to carry out the agreement to care for his foster father, and also his refusal to look after the farm raises the presumption that he did not intend to do so in the first instance and therefore the deed was fraudulent in its inception. *Seymore v. Belding*, 83 Ill. 222; *McClelland v. McClelland*, 176 Ill. 83; *Fabrice v. Von-der-Bre- lie*, 190 Ill. 460; *Stebbins v. Petty*, 209 Ill. 291; *Sherrin v. Flinn*, 155 Ind. 422; *Cree v. Sherfy*, 138 Ind. 354; *Tomlinson v. Tomlinson*, 162 Ind. 530; *Spangler v. Yarbrough*, 23 Okla. 806. (4) A deed is a contract, and in order to make it a valid instrument, there must be a meeting of the minds of the parties to it. The appellant, testified that he was induced to make the deed under the belief that the respondent would live with him, care for him in his old days and look after the farm. Respondent denies that he agreed to do any of these things. Clearly, then, there never was a meeting of mind of the parties to the contract, and it should be set aside. *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 383; *Robinson v. Estes*, 53 Mo. App. 585; *Perkins v. School District*, 99 Mo. App. 487; *Luckey v. Frisco Railroad*, 133 Mo. App. 593; *Green v. Cole*, 103 Mo. 76; *Cockrell v. McIntyre*, 161 Mo. 69. (5) Under all rules of justice and equity, the deed should be set aside. To permit the respondent, a young, healthy and robust man to retain the title to the land would be a travesty on justice. Within a year

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after obtaining the deed, he abandons his foster parent and leaves him in a position, so that he cannot sell the property to support himself in his declining years. It was not necessary to show a wilful design to defraud. *Bishop v. Seal*, 87 Mo. App. 261; *Hurley v. Kennally*, 206 Mo. 282; *Reynolds v. Reynolds*, 234 Mo. 144; *Kincer v. Kincer*, 246 Mo. 419; *Heimeyer v. Heimeyer*, 259 Mo. 515.

*T. H. Douglas* for respondent.

(1) There is no presumption against a voluntary conveyance from parent to child. The burden is not cast upon such grantee unless the relation of trust and confidence is shown by other substantial evidence. No such fiduciary relation is shown by the evidence in this case. *State ex rel. v. True*, 20 Mo. App. 181; *McKinney v. Hensley*, 74 Mo. 332; *Hamilton v. Armstrong*, 120 Mo. 616; *Doherty v. Noble*, 138 Mo. 25; *Hatcher v. Hatcher*, 139 Mo. 614; *McKissock v. Groom*, 148 Mo. 459; *Bonsal v. Randall*, 192 Mo. 532; *Huffman v. Huffman*, 217 Mo. 193; *Jones v. Thomas*, 218 Mo. 508; *Lee v. Lee*, 258 Mo. 599; *Stanfield v. Hennegar*, 259 Mo. 50; *Bennett v. Ward*, 272 Mo. 671. (2) In this case the expressed consideration is one dollar and other valuable consideration. The real consideration is love and affection which is sufficient to support the deed. 13 Cyc. 529, 534; *Draper v. Shoots*, 25 Mo. 202; *Wood v. Broadley*, 76 Mo. 23; *Studybaker v. Cofield*, 159 Mo. 616; *Weissenfels v. Cable*, 208 Mo. 534; *Griffin v. Nickolas*, 224 Mo. 275; *Chambers v. Chambers*, 227 Mo. 287. (3). The finding of the trial court in this case is absolutely correct. In suit to set aside a deed as obtained by fraud, mistake or undue influence, the burden of proof is on the plaintiff, and plaintiff has failed to discharge himself of that burden. *Brown v. Foster*, 112 Mo. 297; *Taylor v. Crockett*, 123 Mo. 300; *Strong v. Whybark*, 204 Mo. 348; *Wing v. Havelik*, 253 Mo. 502; *Turner v. Anderson*, 236 Mo. 523; *Gibony v. Foster*, 230 Mo. 106. (4) Even though plaintiff's contention that defendant promised



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to support plaintiff as consideration for the deed, were correct, which defendant does not concede in any particular, still the deed should not be set aside. *Anderson v. Gaines*, 156 Mo. 664; *Lackland v. Hadley*, 260 Mo. 572.

GOODE, J.—This is a suit in equity, and the petition is in two counts. The object of the first is the cancellation of a deed made by plaintiff to defendant, and of the second to obtain a judgment against defendant for damages and have a lien declared on the land; the gravamen of both causes being defendant's alleged failure to render the consideration for which the conveyance was made to him.

Defendant was eighteen years old at the time of the conveyance, and twenty years old when the case was tried. When he was twenty-two months old, he was taken into the home of plaintiff, where he was reared by plaintiff and his wife as though he were their son, but never adopted. The testimony shows the relations between the parties were always pleasant; that defendant treated his foster parents, as they may be called, well, and they treated him well. Plaintiff's home was on the land involved in this action; a tract of forty acres in Polk County, Missouri, about two miles from the town of Fairplay.

Mrs. Hardaway, plaintiff's wife, died in December, 1911, and afterwards plaintiff and defendant continued to reside at the home place, "baching it," as they expressed their way of living. Plaintiff appears to have been strongly attached to defendant and to have formed an intention, at some time before the deed in question was made, to leave, by will, his small estate to defendant, although plaintiff had four living children, who were married and settled; some in the vicinity of the farm and others elsewhere. Plaintiff had expressed a wish to dispose of his property so a son-in-law would derive no benefit from it; but this sentiment does not appear to have had much, if any, influence in causing him to make the deed in controversy. Some time before the date of its execution, but how long is not stated, plain-

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tiff, according to his own testimony, had executed two wills, giving to defendant by the first everything he had, and by the second, everything he had except twenty dollars to each of his children. There is testimony tending to prove he became apprehensive lest, if he devised his property to defendant, the will would be contested and set aside; and he consulted a neighbor by the name of Turley, about whether it would be better to convey the farm to defendant or make a will in the latter's favor; and Turley told him as far as he (Turley) knew, the deed could be contested as well as a will. Plaintiff finally decided to convey it by deed; and whether or not he did so upon the agreement of defendant to remain on the farm and take care of plaintiff as long as plaintiff lived, is the issue of fact on which the case depends.

On December 23, 1915, plaintiff went to Bolivar the county seat of Polk County, accompanied, at his request, by Turley, and called upon Mr. Cunningham, an attorney. Plaintiff asked the attorney about the effect of the will he had made in defendant's favor, and the attorney said he was unable to advise concerning the effect of the will without seeing it, or whether it would be more prudent to make a deed. At that time, or on a second visit to the office the same day, the attorney told him that a will, properly drawn, was as good as a deed; but plaintiff replied he was afraid a will would be contested. He further stated to the attorney that he wanted the boy (defendant) to have the land, and asked that a deed be drawn so as to convey it to defendant, but with a reservation of the rents and profits to plaintiff while he lived. Turley had left the attorney's office shortly after entering it, and plaintiff left after he had directed the preparation of the deed. The deed was drawn in the form of an indenture, with plaintiff as party of the first part and defendant party of the second part. It recites a consideration of one dollar and "other valuable considerations" paid by the second party. The granting clause contains the words "grant, bargain, sell, convey and confirm;" the land is described

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as the northwest quarter of the southeast quarter of Section 30, Township 34, Range 24, Polk County, Missouri, and this reservation is made: "W. R. Hardaway hereby reserves the right to use, occupy and enjoy said real estate and all the rents and profits therefrom during his natural life." Covenants of warranty and indefeasible seisin and against incumbrances follow. Plaintiff returned later to the attorney's office, got the instrument and took it away with him, without signing or acknowledging it. On December 30th he went to Fairplay, called upon the cashier of the bank where he did business, and signed and acknowledged the deed in the presence of the cashier, who was a notary public. The cashier testified he read the deed over to plaintiff, as was his custom when he took an acknowledgment. Plaintiff said nothing about the disposition of his property at the time; but on previous occasions had told the cashier defendant was a good boy and he wanted him to have his (plaintiff's) property. The deed was not delivered to defendant on that day, nor until some time in January, 1916. Plaintiff was then sick in bed and one day, during his illness, he called defendant to him and expressed a fear that he would not get well; at the same time telling defendant to get something out of the pocket of plaintiff's overcoat which was hanging on the wall. Defendant took a long envelope out of his pocket, which contained the deed. Plaintiff remarked: "You know what this is?" Defendant replied he did not. Plaintiff told him to read it; then said: "It is no good unless signed by two witnesses in my presence," and ordered defendant to bring two men to the house next day to witness the deed. Accordingly Joseph Gillispie and Charles Bowman, two neighbors, came to the house the next day at defendant's request, and plaintiff asked them to sign the deed, after which he said: "You men witness me give this deed to Sherman," further saying to defendant: "You can do what you please with it; but if I was you, I would take it to the bank where it would be safe. It might be burned, or something like that, and it will be safe in the bank." He then handed the deed to defendant and asked

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him not to record it until he (plaintiff) was dead; to which request defendant made no answer; and, in fact, according to the witnesses, said nothing whatever when the deed was delivered to him.

On February 27, 1916, or about two months after the delivery of the deed, defendant married, with the consent of plaintiff, and brought his wife to the farm, where they continued to live until February 17, 1917; meanwhile the affairs of the house and farm going on as they had previously. There is no testimony to show any disagreements, and, on the contrary, plaintiff testified he got along well with defendant and his wife. Defendant heard plaintiff had expressed an intention to a neighbor that he was going "to farm the place" for himself during the year 1917, and this report led to a conversation, begun by defendant, with the remark that he understood plaintiff was going to farm for himself that year. In the course of the conversation defendant said he had not made any money and had to have some to buy groceries; that he had heard big wages could be obtained in Nebraska, asking plaintiff what he thought of defendant's going there for the summer and working to get a little money to buy cattle with and thereby make a better living. Plaintiff expressed himself to the effect that this would be a good course to take, saying if defendant could get a place to work for a man who liked him and whom he liked, he had better stay there, as there was nothing for him on the farm. Shortly afterwards, on February 17, 1917, defendant and his wife went to Nebraska, first paying a short visit to her father. The present suit was filed on February 26, 1917, or nine days after defendant had left, and on constructive instead of personal service.

The essential averments of the first paragraph of the petition are, that plaintiff placed great trust and confidence in defendant; plaintiff had no one to look after him and care for him; "that during the month of December, 1915, the defendant, with a fraudulent view and intention of getting plaintiff to execute a deed to defendant, conveying to him the premises in controver-

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sy, agreed with plaintiff that, if plaintiff would deed and convey to him, the defendant, the premises above described, he, the defendant, would remain and live with plaintiff and nurse and take care of him, and look after him, and would cultivate the premises above described. That the defendant procured other parties to talk to plaintiff and to try to induce plaintiff to convey said premises to the defendant upon said representations, the plaintiff to retain a life estate therein. That the defendant agreed that, if plaintiff would so convey to him the remainder in fee in said premises after the life estate of the plaintiff, he would not have said deed recorded until after the death of plaintiff, and that he would faithfully look after said premises and would turn over the proceeds to plaintiff during his life, and that he would also faithfully care for, nurse and look after plaintiff in his old age and make him as comfortable as possible." It is further averred that plaintiff, in reliance on these promises and representations, executed the deed in question; that defendant never performed any of the agreements on his part; has not looked after the premises, and has failed and refused to care for, look after or nurse plaintiff.

The gist of the second count is the same, but, as stated, the prayer in that count is for damages to the amount of \$1250 "by reason of the failure of defendant to perform the conditions of the agreement on his part," and to have a judgment for that amount declared a lien on the premises in dispute.

Adverting to the averment of an agreement by defendant to remain with plaintiff and take care of him, cultivate the premises, etc., we remark that not a word of evidence is contained in the record to prove defendant, in person, ever agreed, as alleged; plaintiff himself testifying he never spoke to defendant on the subject of making a will or deed in defendant's favor, nor did defendant ever speak to him on the subject. This averment of the agreement is supported by no evidence, except some tending to prove Turley had broached the matter to plaintiff at the instigation or with the con-

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nivance of defendant. Plaintiff testified: "I guess I was influenced to make this deed; Mr. Sol Turley talked to be about making it. . . . I made the deed because I thought he would do what Turley said he would do—stay there and take care of me as long as I lived. If I had not understood that I would not have made Sherman the deed." He further testified Turley spoke to him three times on this subject; the first time was in a field on the farm, where Turley said, according to plaintiff's testimony: "Sherman says he cannot do any permanent improvements on the forty if he cannot get something permanent he can hold after you are dead and gone. I did not agree to make the deed then. In about a week Mr. Turley came back to see me and said that Sherman would take the forty acres of land and keep it up and take care of me as long as I lived, if I would make him a deed to it." He further said no one except Turley talked to him on the subject; also, that he never had any conversation with defendant about taking care of him. Turley, who was a disinterested witness, positively denied the alleged conversations in the form plaintiff related them, the effect of Turley's testimony being that plaintiff declared he wanted to give the property to defendant and asked information about whether a deed would be more effective for that purpose than a will. Turley also denied, as did defendant, any conversations between the two about the deed or will, or that Turley should speak to plaintiff in defendant's behalf.

Such, in substance, is the evidence in the case, there being bits of testimony corroborative of plaintiff that Turley promised for defendant the latter would take care of plaintiff as long as he lived, if the deed was made. But the heavy weight of the evidence goes to prove plaintiff made the deed of his own volition and without any agreement on the part of defendant, either directly or through Turley, and pursuant to a long-cherished purpose to arrange in some manner, either by deed or will, so defendant would own the farm after plaintiff's death. There was much testimony, too, that plaintiff, although

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seventy-three years old at the time the deed was executed, was in full possession of his faculties; a man of decided character and difficult to influence.

Before instituting the action, plaintiff asked defendant, by letter, to reconvey the land, agreeing, if this was done, defendant should share equally in plaintiff's estate with his children.

An appeal was taken from a judgment denying relief to plaintiff.

The facts in this case dispense with the necessity of discussing legal propositions; for by no pertinent doctrine or rule of equity is the plaintiff entitled to have the deed set aside or a lien declared on the land, notwithstanding the disposition of the courts to relieve disappointed grantors in a case like the present. No other judgment was possible than the one rendered by the court, without disregarding the weight of the testimony, which shows, in our opinion, the conveyance was a purely voluntary act on the part of plaintiff, neither induced by any undue influence practiced by defendant, or any promise of his made in person or through Turley. The question occurs to one, whether in the absence of fraud on the part of defendant, his supposed agreement could be made the basis of a suit for relief, in view of the fact that he is under age; but we pass over this point, because we find no agreement was made by him. Besides, there is no proof that defendant has refused to live on the farm or take care of plaintiff, if in fact, he agreed to do so. He went to Nebraska with plaintiff's consent, pursuant to his advice that defendant could do better there, and, for aught that appears, with no ill feeling on either side. No protest was made by plaintiff or demand that defendant should remain and perform his alleged agreement; but, instead, nine days after he left, the present suit was commenced; doubtless, because plaintiff regretted having conveyed the land. A case identical in all respects, including the minority of the grantee, the supposed promise to care for the grantor during life, the conveyance of an estate in remainder to the grantee in consider-

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ation of the promise, and the grantee's subsequent departure from the land with the consent of the grantor to try his fortunes in a western state, is *Williams v. Langwill*, 241 Ill. 441.

The judgment is affirmed. All concur.

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W. W. PARSONS, Appellant, v. HARRY E. HARVEY.

Division Two, March 13, 1920.

1. **EVIDENCE: Former Pleading.** An answer, abandoned by the filing of an amended one, may be offered in evidence by plaintiff as an admission on defendant's part.
2. **WIDOWER'S SHARE: Note to Deceased Wife: Estoppel.** When the appointment of an administrator upon a deceased wife's estate is legally dispensed with, a note for \$500 payable to her, being her sole property, becomes the absolute property of her husband as her widower; it could not have been given away by her, nor willed away, nor taken by her creditors. If its payment is to be avoided in a suit thereon by her widower, the maker must either establish payment prior to her death, or plead and establish such an application, with the husband's acquiescence, of an equal amount of money after her death, as amounts to an estoppel, such as the payment of her funeral expenses.
3. **EVIDENCE: One Party Dead: Denial of Other Testimony.** in a suit on a note given by defendant to his deceased mother, defendant is a competent witness to deny conversations occurring after her death to which plaintiff's witnesses have testified, but he is not a competent witness to deny that a conversation took place between him and her wherein he agreed to pay her funeral expenses in addition to the amount of the note.
4. **CONSTITUTIONAL LAW: Sec. 10, E. S. 1909; Orders Made in Vacation.** Section 10, Revised Statutes 1909, authorizing the probate court, or judge thereof, in vacation, to refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children, is not violative of any provision of the Constitution. It gives to creditors and other interested parties opportunity to challenge the order by timely action in court; and, besides, the action of the court is not in strict sense judicial, but the statute is similar to many others



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enacted for the public convenience and to simplify the business before such courts, at a minimum cost, without injury to any one.

Appeal from Schuyler Circuit Court.—*Hon. N. M. Pettigill*, Judge.

REVERSED AND REMANDED (*with directions*).

*Fogle & Fogle* for appellant.

(1) This note upon the death of Mary E. Parsons, on compliance with the law, became the absolute property of W. W. Parsons, but the title thereto passed to her legal representative. It could not be willed away, given away, or taken by her creditors or for Mrs. Parsons' debts. *Glenn v. Dunn*, 88 Mo. App. 442; *Barnum v. Barnum*, 119 Mo. App. 66; *Lowe v. Lowe's Executors*, 163 Mo. App. 213; *Nelson v. Troll*, 173 Mo. App. 51. (2) The proceeds of the note could not be taken to pay the expenses of the administration of Mary E. Parsons, because it was the absolute property of W. W. Parsons upon her death if he exercised his right in due time. *State v. Johnson*, 177 Mo. App. 584; *Lamar's Admr. v. Belcher's Exr.*, 154 Mo. App. 171. (3) The widow or widower may make his or her election of the property from the legal representative of the estate at any time before the same is paid out or distributed or have the estate discharged from administration. *Drowry v. Baur*, 68 Mo. 155; *Cummings v. Cummings*, 51 Mo. 261; *In re Estate of Howard*, 128 Mo. App. 482; *Hill v. Evans*, 114 Mo. App. 715; *Lamar v. Belcher*, 151 Mo. App. 571; Secs. 114, 115, 116, 117, 118, 119, 120, 10, R. S. 1909; *Nelson v. Troll*, 173 Mo. App. 51. (4) If there were any arrangements between Harry Harvey and his mother that he should take the note after her death and pay each of her children his or her part or keep himself his part or pay funeral expenses or any other arrangement, such arrangements were absolutely void, as testamentary in character. *Kyl v. Westerhaus*, 42 Mo. App. 49; *Tye v. Tye*, 88 Mo. App.

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330; Tygard v. McComb, 54 Mo. App. 85. (5) By operation of law and the order of the probate court, W. W. Parsons in this case became the absolute owner of said note and entitled to immediate possession thereof with the authority to sue for, and collect the same or the value thereof as provided by Sec. 10, R. S. 1909. McMillan v. Wacker, 57 Mo. App. 220; Perkins v. Goddin, 111 Mo. App. 438. (6) Defendant was guilty of conversion of said note when he took the same from the trunk in the way as shown by the evidence. Wilkinson v. Misner, 158 Mo. 551. (7) On the trial of this cause W. W. Parsons was vested with all the rights of an administrator, hence the defendant was incompetent as a witness to testify to any facts that occurred before the refusal of administration. Sec. 10, R. S. 1909; Myers v. Manlove, 101 N. E. 661; Kersey v. O'Day, 173 Mo. 560. (8) Mary E. Parsons, the payee in the note, was dead at the time of this trial. The note was the cause of action in issue and on trial. Harvey was the maker and payor of said note and the defendant in the case. The answer of the defendant pleaded payment, hence Harvey was incompetent to testify to any facts pertaining to the note or conversation concerning it or to any circumstance when it was called in controversy. Secs. 63-54, R. S. 1909; Weiland v. Wayland, 64 Mo. 168; Bishop v. Briton, 229 Mo. 73; Angell v. Hisler, 64 Mo. 142; Powell v. Bosard, 79 Mo. App. 672; Hisaw v. Sigler, 68 Mo. 449; Litner v. Gregg, 61 Mo. 449; Leavea v. Southern Ry. Co., 171 Mo. App. 24; Leavea v. Southern Ry. Co., 266 Mo. 151. (9) Abandoned pleadings are competent evidence against the party making them. The statements, allegations, etc., may be used against the party making them and sometimes may be used to show afterthought or a new creation, and the court erred in excluding defendant's abandoned pleading offered by the plaintiff in evidence. Walser v. Wear, 141 Mo. 463; Edison v. Railroad, 248 Mo. 415.

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*Higbee & Mills* for respondent.

(1) There was no conversion of the note. Plaintiff was present, heard and saw his daughter give it to defendant; made no objection. He knew of the arrangement of his wife and this defendant as to the manner in which said note was to be paid. He stood by and permitted defendant to finish payment of said note in said manner; allowed him to defray funeral expenses, erect a monument, pay doctor's bill, etc., as payments on the note, which plaintiff alone was otherwise bound to pay. *Doyle v. Burns*, 99 N. W. 204; 38 Cyc. 2009. (2) Sec. 10, R. S. 1909, is unconstitutional in so far as it seeks to confer judicial powers upon a probate judge in vacation. In *re Letcher*, 190 S. W. 19; *State ex rel. v. Locker*, 266 Mo. 384; *State ex rel. v. Woodson*, 161 Mo. 454; *Carter v. Carter*, 237 Mo. 633. Unless letters have been properly dispensed with and the title to the note in suit properly passed to plaintiff he has no standing in court; plaintiff's demurrer should have been sustained. *McMillan v. Wackes*, 57 Mo. App. 220; *Perkins v. Goodwin*, 111 Mo. App. 429. (3) Plaintiff is not an administrator and is not suing in that capacity. He claims that the note has been transferred to him, and that administration has been dispensed with. Hence the competency of defendant as a witness is not a question arising under Section 6354, R. S. 1909. Appellant's argument would perpetually incapacitate defendant as a witness in a cause wherein the estate of the deceased was not interested. The issue here is, Did the defendant convert the note after his mother's death? On this issue he is a competent witness. *Weiermueller v. Scullin*, 203 Mo. 466.

RAILEY, C.—This case was appealed by plaintiff to the Kansas City Court of Appeals, and certified by the latter to this court, on account of a constitutional question raised therein. We have read the record, the briefs of counsel, and the opinion of the Court of Appeals, certifying the case here. Subject to the con-

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clusion which we may hereafter reach, in respect to the constitutional question involved, we are satisfied with the opinion of the Court of Appeals, and hereby adopt the same as expressive of the views of this court, in respect to the matters considered therein.

I. The above opinion, without caption, reads as follows:

“It is somewhat difficult to determine whether plaintiff’s petition is a suit to recover possession of a promissory note alleged to have been taken by defendant and converted to his own use, or whether it is a suit to recover the amount due on said note with the other facts alleged to show why the note sued on was not filed with the petition. In view of the fact that the petition prays for judgment for the amount of the note with interest and that the issue tried by both sides was whether the note was paid, we might regard it as a suit on the note. However, it need not be decided here what the suit is.

Contract for  
Widower’s Share.

“Plaintiff is the step-father of defendant. The latter’s mother, by her first husband, had four children, and by her last husband, the plaintiff, she had two, but only one of these survived her, the other dying without issue. Prior to May 24, 1904, Mrs. Parsons owned a 40-acre farm of unimproved brush land. On that day she and her husband deeded said land to the defendant, reserving the right to the possession of said land as long as they desired to live thereon, together with the rents and profits thereof during their occupancy; and if the husband, W. W. Parsons, should survive his wife he was not to have any further interest in or right to the possession of said land. Said deed recited a consideration of \$1036, and on the same day defendant executed a mortgage on the land securing a note to Mrs. Parsons for \$750, due in five years, with four per cent interest, representing the unpaid purchase price of said land. On January 6, 1912, this note was taken up and a new note given, but this time it was for \$500, due five

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years after date, bearing six per cent compound interest per annum from date until paid. This note was not secured, no mortgage being given therefor, and the old mortgage was released of record on January 8, 1912. It is this \$500 note that is involved herein.

"From the time said \$500-note was given, up to Mrs. Parsons' death on April 7, 1913, she kept it in her trunk. Upon the arrival of defendant at his mother's home after her death and before her burial, this note was turned over to him by plaintiff's daughter, defendant's half sister, in the presence of plaintiff, who made no objection. Defendant says it was turned over to him voluntarily and without request on his part, but his half sister, who was plaintiff's witness, testified that he demanded the note and when he received it he said, 'Part of this note belongs to you folks.'

"Plaintiff, as widower, under Section 10, Revised Statutes 1909, obtained an order from the probate judge, in vacation, dispensing with administration on his wife's estate on the ground that she left no property greater in amount than that allowed by law to the widower as his absolute property, and authorizing said widower to sue for, collect and retain said property. No order of the probate court approving this vacation order was obtained. After getting said vacation order, said widower brought this suit, either to collect said note or for its conversion, as herein above stated.

"The evidence in plaintiff's behalf tended to show that at the time the \$750-note was taken up and the \$500-note given in lieu thereof, the agreement between defendant and his mother was that he should reserve \$250 to pay for her funeral expenses and would, after that, pay the \$500-note by giving to each of her five children the sum of \$100.

"Defendant's claim is that the agreement was that he was to furnish money for her support from time to time as she might need it, and upon her death he was to take her body back to her old home in Iowa and bury it by the side of her first husband, pay all funeral expenses and erect a monument for both, all out of the

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\$500-note; that from time to time he sent her money to live on, and upon her death he took her body back to Iowa and there buried it, paid all funeral expenses and erected a monument at an expense of \$110, and that in this way the \$500-note was paid in full.

"While there was evidence tending to show that defendant did send money to his mother at various times, yet it is not clear when this was done. For aught that appears, a large portion of these amounts may have been sent to her before the \$500-note was given, and this may have been the reason why the note was reduced from \$750 to \$500, said payments accounting for the \$250 difference. Defendant's mother lived only a little over a year after the \$500-note was given, and it is not at all clear that the small sums sent from time to time, during that period, or indeed at any time, amounted to \$500. Indeed, it would seem that they did not, since it is shown by the evidence offered in defendant's behalf that after all such payments for his mother's support and for her funeral and monument had been made, he paid one of his mother's heirs, his full sister, \$100 as her part of the note. It is difficult to see why he should have made such distribution to his mother's heir if the amounts he had paid out had equalled said note as he now claims. In addition to this, his half sister testified that he told her he owed her \$100, but would not pay it, as she owed that much rent on the place since his mother died. He admitted telling her he owed her \$100, but was not allowed to give the entire conversation.

"Defendant first filed an answer in which he set up that he had paid his mother's funeral bills, at plaintiff's request, amounting to \$114.50, and that plaintiff owed defendant \$100 as rent for the place he had occupied since his wife's death; but defendant afterwards filed an amended answer, setting up that by supporting his mother and paying her funeral bills and \$110 for a monument he had paid said note. The original answer was offered in evidence by plaintiff, but was excluded

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by the court. We think it should have been admitted for whatever it was worth as an admission:

“Whatever was still due on the note at Mrs. Parsons’ death would pass to her legal representatives the moment one was appointed, and, if the appointment of one was legally dispensed with, then said note became the absolute property of her husband as widower. It could not be given away by her, or willed away, nor taken by her creditors. [Sec. 120, R. S. 1909; Glenn v. Gunn, 88 Mo. App. 442; Nelson v. Troll, 173 Mo. App. 51.] Doubtless, if plaintiff stood by and allowed defendant to pay out money for funeral expenses and for a monument upon the idea that such agreement with his mother was valid, plaintiff would be estopped. But there was no plea of estoppel in this case, nor does it appear that plaintiff knew or consented that defendant should expend money for a monument.

“While defendant may have been a competent witness to deny conversations testified to by plaintiff’s witnesses as having occurred after Mrs. Parsons’ death (Weiermueller v. Scullin, 203 Mo. 466), still he was not a competent witness to deny that a conversation took place between him and his mother wherein the agreement was that he was to pay the funeral expenses out of the \$250 which represented the difference between the \$750-note and the \$500-note. That was testifying in regard to the contract between him and his mother. It was the contract in issue and on trial and the opposite party to that contract was dead. Plaintiff had from the first objected to his competency, and upon his denial of such conversation, moved to strike out the evidence as incompetent, but the objection was overruled, and exceptions were saved.

“It is apparent from the foregoing that appellant is entitled to a reversal and remanding of the case unless a contention made by the defendant, which we have not mentioned until now, must be upheld.

“That contention is that the mere order of the probate judge made in vacation, and without any order of the court approving or confirming it, is wholly insuffi-

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cient to dispense with administration and vest title to the note in plaintiff as Mrs. Parsons' widower. Consequently, defendant says that neither plaintiff's petition nor his evidence shows any cause of action in him. This contention is based upon the claim that Section 10, Revised Statutes 1909, which authorizes the probate judge *in vacation* to make such order, is, to that extent, unconstitutional, in that it is in conflict with Sections 1 and 34 of Article 6 of the Constitution. This claim of unconstitutionality was asserted from the first, being clearly and specifically set up in the answer filed and preserved throughout the case.

"We are, therefore, unable to decide the case without either ignoring this point or else passing upon it one way or the other. The jurisdiction to decide the constitutionality of the section, however, lies with the Supreme Court, and not with us. Hence it is our duty to order the case transferred to that court, which is accordingly done. All concur."

II. It is contended by appellant that the order of the probate judge in vacation, without any order of the probate court approving or confirming it, is sufficient to dispense with administration, and to vest title to the note in controversy in plaintiff as Mrs. Parsons' widower. Defendant accordingly asserts that neither plaintiff's petition, nor his evidence, show any

Order in  
Vacation.

cause of action in him. The above contention is based upon the idea that Section 10, Revised Statutes 1909, which authorizes the probate judge in vacation to make such an order, is, to that extent, unconstitutional, in that it is in conflict with Sections 1 and 34 of Article 6, of the Constitution.

Sections 1 and 34 of Article 6 of the Constitution, relied on by appellant, read as follows:

"Sec. I The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts."



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“Sec. 34. The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected. Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians and the sale or leasing of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices; *Provided*, That until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law.”

Section 35 of said Article 6 reads as follows:

“Probate courts shall be uniform in their organization, jurisdiction, duties and practice, except that a separate clerk may be provided for, or the judge may be required to act, *ex officio*, as his own clerk.”

In addition to above Sections 1 and 34 of Article 6, we are cited by appellant, in support of his contention that Section 10, Revised Statutes 1909, is unconstitutional, to the following authorities: State ex rel. v. Locker, 266 Mo. 384; State ex rel. v. Woodson, 161 Mo. l. c. 454; In re Letcher, 190 S. W. 19.

In the last named case, Court in Banc was called upon to construe Sections 10409, 10412 and 10413, Revised Statutes 1909. These three sections read as follows:

“Sec. 10409. If any person whose office has become vacated, or his executors or administrators, shall fail to deliver any record, book or paper to the person entitled to the same, any judge of the Supreme or Circuit Court, upon the affidavit of any credible person, setting forth the facts, may issue his warrant, directed to the sheriff, marshal or coroner, commanding him to seize all the records, books and papers appertaining to such office, and deliver them to the proper officer named in such warrant.

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"Sec. 10412. Any person aggrieved by any such warrant may apply to any judge of the Supreme or Circuit Court, who, upon affidavit of the applicant that injustice has been done or is about to be done by such warrant, shall issue a citation to all persons interested, commanding them to appear before him at a place and time named in the citation, which shall be served by the sheriff, marshal or coroner.

"Sec. 10413. The judge may enforce obedience to such citation by attachment, and shall proceed in a summary manner and determine the matter according to right and justice, and may issue his warrant for the restoration of any record, book or paper found to have been improperly seized."

Judge FARIS, speaking for Court in Banc, on page 21, said:

"Even a casual examination of the statutes under which the initial proceeding herein was brought (Article 1 of Chapter 101, R. S. 1909) shows that it is contemplated that a hearing may be had thereunder to determine the right of possession of the records claimed in the affidavit. Indeed, it is patent that any scheme or so-called procedure which (upon an order issued pursuant to an *ex parte* affidavit) would permit one person to take from another any article, or record, or property, arbitrarily, without any hearing, or day in court, or without affording any opportunity to be heard, would be to take the property of another without due process of law. [Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.] In short, unless we construe the statutes in question as contemplating among their provisions the affording of an opportunity for a hearing of the disputed question of the right of possession of the records so arbitrarily taken, then the whole scheme is utterly void. To uphold these statutes at all, we must contrive Sections 10412 and 10413 as permitting a hearing to one from whose possession records are arbitrarily taken by order of the court, or judge who issues such 'warrant.' In such a hearing, wherein the court or judge is required to 'determine the matter according to right and justice'

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(Section 10413, R. S. 1909), such officer or tribunal acts judicially, otherwise he could not act at all."

On page 22, Judge FARIS further observed:

"It follows, we think, that Sections 10409, 10412, and 10413, Revised Statutes 1909, so far as they purport to give this court, or a judge thereof, original jurisdiction to issue the order therein provided for and to hear and determine the disputed right to the possession of books and records, according to right and justice, are void because not within constitutional delimitations."

The facts in above case, as well as the holding of the court in reference thereto, clearly distinguish it from the matter now before us.

In State ex rel. v. Locker, 266 Mo. 384 and following, the question before Court in Banc was whether the probate courts of this State, by virtue of Sections 2441-2, are authorized to issue writs of *habeas corpus*. Judge GRAVES, speaking for said court, on page 392, held that they were not authorized by the provisions of our Constitution to issue such writs. The question now before us was neither considered nor discussed.

In State ex rel. v. Woodson, 161 Mo. l. c. 446-7, a judge of the circuit court, in vacation, at the instance of the Supervisor of Building & Loan Association, in winding up its affairs, examined the matters presented for his consideration, and made the following order in reference to the subject: "It is therefore ordered that said building and loan association be dissolved, and the officers, agents, and employees of said association are hereby enjoined from further conducting the business of said association," etc. Judge VALLIANT, speaking for Court in Banc, on pages 454-5, said:

*"It is contended, that our Statutes confer on the Judge the authority to hear and determine the whole issues in a case of this kind in vacation. If there is such a statute, it is in violation of Section 1, Article 6, of our Constitution, above quoted. In that section the Constitution disposes of all the judicial power of the State in matters of law and equity, and it leaves nothing to be disposed of by the General Assembly. This is the view*

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the Supreme Court of Michigan took of the same subject. That court said: 'By Article 6, Section 1, of our Constitution, the judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. . . Section 2 of this act confers upon the judge in vacation the authority to hear and determine summarily upon the questions of the insolvency of the debtor; the giving or attempting to give preferences; his refusal or neglect to make assignment of his property; and his orders and judgment (if he makes any) are final and conclusive. . . . A statute which confers such judicial powers upon a circuit judge at chambers is clearly in conflict with Article 6, Section 1, of the Constitution.' [Risser v. Hoyt, 53 Mich. 185.]

*"What is here said is in reference to judicial power in its strict sense. There are quasi-judicial powers conferred upon quasi-judicial bodies, and powers to do certain acts in vacation, judicial in character, but subsidiary to a suit pending or about to be instituted in court, are conferred on judges of courts; but the power to try issues in a suit at law or in equity, and pronounce judgment or decree upon the facts found or confessed, can be conferred, under our Constitution, only on a fully organized court."* (Italics ours).

In the above case, the order made by the trial judge in vacation, indicates that he attempted to try the *cause*, as he would have done had all the proceedings taken place during the *regular* term of court. The suggestions made by Judge VALLIANT, italicised as above, clearly indicate that his views of the law are not in accord with appellant's, based upon the facts before us.

Section 10, Revised Statutes 1909, the constitutionality of which is challenged by appellant, reads as follows:

"The probate court, or the judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of sixteen years. Proof may be allowed by or on behalf

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of such widower, widow or minor children before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, he or it shall order that no letters of administration shall be issued on such estate, unless, on the application of creditors or other parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow or minor children shall be authorized to collect, sue for and retain all the property belonging to such estate; if a widower or widow, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of sixteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suits."

The order made by the probate judge in vacation, is couched in the following language:

"Now at this day comes William W. Parsons, *and shows to the court* that he is the widower of Mary F. Parsons, late of the county of Schuyler, deceased, who died, having at the time of her death personal property in this State, not greater in amount than is allowed by law as the absolute property of the widower.

"To the end, therefore, that the said William W. Parsons, as such widower, may be authorized and empowered to collect, sue for and retain said property, as his absolute property, as provided by law, it is ordered that letters of administration on said estate be refused, unless on the application of creditors or other parties interested, the existence of further or other property be shown." (*Italics ours.*)

Other sections of the Administration and Guardian laws of this State have been enacted for the benefit and convenience of the public, which are similar in principle

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to Section 10, *supra*, some of which are as follows: Sections 9, 29, 404, 424, 547, Revised Statutes 1909.

It is manifest that Section 34 of Article 6 of our Constitution confers upon probate courts complete jurisdiction over all matters pertaining to probate business. There is nothing in our Constitution which forbids the General Assembly from passing practical and common-sense statutes, like Section 10, *supra*, which facilitate the transaction and convenience of public business, at a minimum expense, and that, too, without doing an injury to creditors and other persons, whose rights may still be asserted before the court. The judge in the case at bar, disposed of the question before him, just as he would have done, had the matter been presented during term time. The order made was not final, and appellant, if he had seen fit to do so, might have challenged the action of the judge, by taking timely steps before the court. These statutes are enacted because of their public convenience. They simplify the business before such courts, at a minimum cost, and without injury to anyone. Our court has, from time to time, sustained laws, which authorized a judge or judges to perform some duty enjoined upon him by the General Assembly. [State ex rel. Lionberger v. Tolle, 71 Mo. l. c. 648; State ex rel. O'Malley v. Lesueur, 103 Mo. l. c. 262-3; State v. Hathaway, 115 Mo. l. c. 49; State ex rel. v. Higgins, 125 Mo. l. c. 368; St. Joseph v. Truckenmiller, 183 Mo. 9; State ex rel. v. Andrae, 216 Mo. l. c. 629; State ex rel. v. Bird, 253 Mo. l. c. 579; State ex rel. v. Tincher, 258 Mo. l. c. 19; Johnson v. Railroad, 259 Mo. l. c. 544; School District v. School District, 181 Mo. App. l. c. 592; 7 R. C. L. sec. 2, p. 973; 7 R. C. L. secs. 6 and 7, pp. 777-8; 15 R. C. L. sec. 12, p. 522.]

In State v. Hathaway, 115 Mo. l. c. 49, in discussing a similar question, Judge GANTT, among other things, said:

"As was said by the Supreme Court of Indiana in Wilkins v. State, 16 N. E. Rep. 192, upon this identical point: 'If the appellant were correct in his assumption, then every school examiner who examines an applicant for

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license, every clerk who accepts and acts upon affidavit, every auditor who accepts an abstract of title when he loans school funds, and every officer who approves a report, would exercise judicial functions. *That they do, in some degree, act judicially, is true*, and do does every officer from the governor to constable, who is invested with discretionary powers; . . . but no one of these officers exercises judicial judgment in the sense that a court or a judge does. These officers, one and all, are ministerial officers and not judges or courts; and the judicial functions meant by the Constitution *are such only as courts or judges exercise.*'

"A judicial duty within the meaning of the Constitution is such a duty as legitimately pertains to an officer in the department designated by the Constitution as judicial. And we can but commend in this connection the language of the same court in *Flournoy v. City*, 17 Ind. 169: 'An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.' This rule is one quite familiar in this State. It is one that governs sheriffs and constables in making levies and has been applied to the Secretary of the State in determining the sufficiency of a certificate under the election law. *State ex rel. v. Lesueur*, 103 Mo. 253."

In *State ex rel. v. Higgins*, 125 Mo. l. c. 368, Judge BLACK, speaking for the court, said:

"As said in *People ex rel. v. Provines*, 34 Cal. 520, l. c. 540, *where a like provision was under consideration*: 'There is nothing in the third article of the Constitution which prohibits a judicial officer from exercising functions, not in their nature judicial, if they do not belong to either the legislative or executive departments, as they are defined and limited in the Constitution.'" (Italics ours.)

In *State ex rel. v. Andrae*, 216 Mo. l. c. 629, Judge GRAVES, in discussing this subject, said:

"The 'judicial powers' referred to in the Constitution are those 'as to matters of law and equity.' This

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means such powers and authority as courts and judges exercise; such as legitimately pertain to an officer in the department designated by the Constitution as judicial; such as are exercised in the ordinary forms of a court of justice, in a suit between parties, with process. It does not include every authority judicial in its nature which requires the exercise of judgment or discretion. [State v. Hathaway, 115 Mo. 36, 48, 49, and cases cited.]”

In State ex rel. v. Bird, 253 Mo. l. c. 579, Judge BROWN, speaking for Court in Banc, said:

“By Sections 34 and 35, Article 6, of our Constitution, it is further provided that the General Assembly shall create probate courts with uniform jurisdiction and duties; so that the Legislature was undoubtedly authorized to vest in said courts such additional powers not named in the Constitution as it deemed proper.”

In State ex rel. v. Tincher, 258 Mo. l. c. 19, Judge WALKER, speaking for Court in Banc, said:

“Despite the constitutional provision, therefore, in regard to jurisdiction and the evident purpose in view in the establishment of probate courts, it is no longer an open question here as to the right of the Legislature to add to the powers of such courts.”

In Johnson v. Railroad, 259 Mo. l. c. 544, Judge GRAVES, after quoting from the Woodson case, supra, among other things, said:

“In other words, the judicial power referred to in the constitutional provision, supra, has reference to the actual and real trial and determination of ‘matters of law and equity’ and not to mere preliminary steps necessary to be taken for the institution of the suit in law or equity. In our judgment the statute does not violate the Constitution, and this point is ruled against the defendant.”

We do not deem it necessary to quote further from these authorities. They sustain the right of the Legislature to pass such laws, for the convenience of the public. We are of the opinion that Section 10, Revised Statutes 1909, is not obnoxious to the criticism leveled against



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it by appellant, nor does it conflict with either Sections 1 or 34 of Article 6 of our Constitution.

In view of the foregoing, we reverse and remand the cause with directions to the trial court to proceed with same in accordance with the views heretofore expressed.

*White and Mozley, CC., concur.*

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

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HUGH A. THOMPSON et al. v. TIMOTHY J. LYONS.  
and SAMUEL B. STROTHER, Administrator of  
Estate of FRED MEYN, Appellants.

Division Two, March 13, 1920.

1. **PLEADING: Cause of Action: Fraud and Deceit.** A petition alleging that defendants represented to plaintiffs that a certain tract of 10.4 acres was worth \$3000 an acre, that it could be bought for such sum, that relying on said representations plaintiffs put up \$16,200 for the purchase of a half interest in the land, that said representations were false and made to deceive and defraud plaintiffs, states a cause of action with sufficient clearness to authorize the introduction of evidence to support it, there being no demurrer filed.
2. **FRAUD AND DECEIT: Verdict of Jury.** The verdict of a jury in an action for fraud and deceit concludes the credibility of the witnesses who testified to the substantial facts necessary to support a petition stating a cause of action.
3. **LIMITATIONS: Purchase of Land Situate in Another State: Applicable Statute.** In an action for fraud and deceit, practiced by defendants upon plaintiffs, resulting in the purchase of land situate in another state, the question of limitations is governed by the statute of such foreign state, since the transaction occurred in said state, although the suit is brought in this State.
4. ———: **Fraud: Discovery: Diligence.** The statute of the foreign state in which the land transaction occurred, providing that "an action for relief on ground of fraud" shall be brought within two

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years, but that "the cause of action shall not be deemed to have accrued until the discovery of the fraud," cannot be held to bar the action on the sole ground that no facts were pleaded or proven to show that reasonable diligence was used to discover the fraud. The said statute has been construed by the courts of the foreign state to mean that if for any reason no obligation exists to consult the record which the law requires to be kept as the source of information, or if the defrauded person be circumvented from taking advantage of his opportunity, no duty rests upon the defrauded person to improve with diligence the opportunity of learning that which the record discloses. No duty rests upon the defrauded person to examine records which do not impart notice, but which are the records of a private realty company, to whose books he has no right of access.

5. ———: ———: ———: ———: **Recorded Deed: Consideration of One Dollar.** The Supreme Court of Kansas holds that a record imparts notice only of what it contains. The record of a deed reciting a consideration of one dollar is not notice that the purchase price of the land was \$14,920, instead of \$32,400, which defendants represented to plaintiffs was the purchase price. That record imposed no duty on plaintiffs to use diligence to discover the fraud.
6. ———: ———: ———: ———: **Fiduciary Relation: Partners.** Where plaintiffs and defendants had entered into partnership for the purchase of the land and defendants represented to plaintiffs that the land was worth \$32,400 and induced plaintiffs to put up \$16,200 for the purchase of a half interest, and with the money thus placed in their hands defendants bought the entire tract for \$14,960, and a deed conveying the tract to one of them expressed a consideration of only one dollar, there existed a fiduciary relation, and the plaintiffs had a right to rely on defendants' representations and were not required to use diligence to discover that they were false, and the Statute of Limitations did not begin to run until they actually discovered the fraud.
7. ———: ———: ———: ———: **Pleading.** Where plaintiff merely alleges that he did not discover the fraud until a certain date, and defendant, without questioning the sufficiency of the petition, goes to trial, he cannot complain that the petition did not sufficiently plead reasonable diligence to discover the fraud. Besides, where the bar to the action is first raised by defendant's plea of the statute of the state where the transaction occurred, and in reply to that plea plaintiff alleges that the facts constituting the fraud were not discovered by him until a certain date, and no objection to the sufficiency of the reply is made, there is no room for a complaint that the petition did not allege reasonable diligence to discover the fraud.

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8. ———: ———: **Time Between Death of Defendant and Administration.** The time elapsing between the death of a defendant and the appointment of his administrator is excluded in computing the time the Statute of Limitations has run. So that, in an action for fraud and deceit, if the time between the date when the fraudulent transaction was closed up and the date when defendant's administrator was brought in has not been five years, excluding the time which elapsed between the death of the defendant and the appointment of his administrator, the action is not barred by the Missouri Statute of Limitations.
9. **FRAUD AND DECEIT: Immoral or Illegal Contract: Unlawful Use of Official Position: Recovery.** Courts refuse to grant relief for gambling and other immoral or unlawful contracts, either by enforcing them, or by awarding damages for the breach of them; but where one of the parties is defrauded by a transaction against public policy, he may recover in an action for fraud and deceit the money fraudulently obtained from him. So that where defendants induced plaintiffs to put up money for a half interest in land to be purchased and falsely represented that the property was worth \$32,400 and could not be purchased for less, and further represented that plaintiffs should not be known in the deal for the reason one of defendants was a county commissioner and the other a member of the drainage board and they could get the property cheaper if plaintiffs were not known in the deal, and plaintiffs put up \$16,200 and the deed expressed a consideration of only one dollar and named only one of the defendants as grantee, and it afterwards developed that the entire property had been bought for only \$14,960, a recovery by plaintiff's in their action of fraud and deceit, is not precluded on the theory that they and defendants had entered into an illegal contract or scheme, out of which defendants' liability arose. The rule is that if defendants by misrepresentation of certain facts, or by an illegal use of their official position, induced plaintiffs to enter into an illegal contract and thereby defrauded plaintiffs out of their money, defendants cannot resist recovery by plaintiffs in an action of fraud and deceit on the ground that the scheme was unlawful.
10. ———: **Measure of Damages.** Where one person makes a purchase for another, or where one of two or more joint purchasers conducts a joint purchase, and falsely represents that the price is actually greater than what is actually paid for the property, the measure of damages is the difference between the amount actually paid by the party defrauded and the true purchase price. So where defendants, in an endeavor to induce plaintiffs to join with them to purchase land, represented that the property was worth \$3000 per acre, whereas it was actually bought by defendants for less than \$1500 per acre, the court properly re-

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fused an instruction directing the jury to return a verdict for defendants if at the time plaintiffs bought a half interest the property was reasonably worth \$3000 per acre; but properly instructed the jury to assess plaintiffs' damages, if they found for plaintiffs, at the difference between what plaintiffs paid defendants for a half interest and one-half the amount defendants actually paid to the grantor for the entire tract.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner*, Judge.

**AFFIRMED.**

*John H. Lucas, William G. Holt and C. W. Trickett*,  
for appellants.

(1) The amended petition does not state facts sufficient to constitute a cause of action against defendants, because: The gist of the action is alleged fraud inducing the sale and purchase of real estate. (a) The contract is not charged to be in writing; therefore, it must be presumed to rest in parol. The Statute of Frauds applies, and no cause of action can be stated. Sec. 2783, R. S. 1909; *Knight v. Rawlings*, 205 Mo. 412. (b) The amended petition fails to state a single act upon the part of the defendants or either of them which concealed or tended to conceal the alleged fraud. "It must be of an affirmative character and must be alleged and proved." *State ex rel. v. Musick*, 145 Mo. App. 33. (c) "General allegations of fraud or other general allegations, no facts being stated, are but legal conclusions, and for that reason are insufficient." The amended petition does not charge that the defendants falsely and fraudulently did any particular thing. The amended petition merely charges that the defendants made certain representations which, they allege, turned out to be false. (d) Especially is this true of the separate replies filed by plaintiffs to the separate answers of the defendants. In each separate reply it is alleged generally "that by the acts and conduct of defendants and each of

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them, . . . secretly and surreptitiously perpetrated said fraud and concealed the facts," etc. Not a single fact is alleged. *Hoester v. Sammelmann*, 101 Mo. 624. (e) "A mere charge of fraud, without specification of the act or acts which constitute the alleged fraud, amounts to nothing in pleading." *Newman v. Trust Co.*, 189 Mo. 444. (f) A party seeking to avoid the bar of the statute of limitations on account of fraud, must aver and show that he used due diligence to detect it. *Shelby County v. Bragg*, 135 Mo. 300. (g) The petition must charge and the evidence must show, that it was by reason of something defendants did or said that the alleged fraud was not discovered sooner. *Callan v. Callan*, 175 Mo. 346. (h) In the instant case the alleged fraud was not of a secret nature. It was a matter open to the plaintiffs at all times. "By inquiry of the owner of the land they could have learned that fact, and there is no evidence that defendants did or said anything to prevent a discovery of the alleged fraud." *Scott & Bowker v. Boswell*, 136 Mo. App. 606. (i) The question is not whether the plaintiffs were merely ignorant of the facts constituting the cause of action. Such ignorance will not suspend the operation of the statute unless it can be properly attributed to the fraudulent concealment of the facts by defendant. *Wells v. Halpin*, 59 Mo. 97; *Johnson v. United Rys.*, 243 Mo. 298. (j) It is essential to state a cause of action based upon fraudulent representations, that it be charged in the petition that plaintiff was deceived thereby, and relying upon such representations, he was induced to act to his injury. There is neither allegation nor proof that the alleged false representations induced plaintiffs to purchase the real estate in question. *Remmers v. Remmers*, 217 Mo. 556; *Powell v. Adams*, 98 Mo. 604. (k) False representations, to be actionable, must relate to a past or existing fact; and a promise to perform something in the future, standing alone, cannot be made the basis of an action for fraud. *Stockings v. Howard*, 73 Mo. 25; *Bullock v. Wooldridge*, 42 Mo. App. 356; *Davidson v. Hobson*, 59 Mo. App. 130; *Mathews v. Eby*, 149 Mo.

App. 157. (1) As a general rule representations made during the negotiation of a contract, which show on their face that they were not intended as a statement of existing facts, but as a prophecy of things to come, do not constitute actionable representations, however, wide of the event the prediction may turn out to have been. *McFarland v. Railway Co.*, 125 Mo. 253; *Bretzfelder v. Waddle*, 122 Mo. App. 462. (2) The transaction complained of having occurred in the State of Kansas, the Statute of Limitations of that State applies. The cause of action having accrued more than two years prior to the commencement of the action, the cause was barred. Sec. 6907, General Statutes of Kansas, 1915, same being Sec. 17, Chap. 182, Session Laws of Kansas 1909. (a) There is neither allegation nor proof that plaintiffs used any diligence to discover the alleged fraud; there is neither allegation nor proof that the defendants or either of them said or did anything to prevent the discovery of the alleged fraud, and for these reasons the plaintiffs are not entitled to recover. *Callan v. Callan*, 175 Mo. 346. (b) A party seeking to avoid the bar of the statute on account of fraud, must aver and prove that he used diligence to discover it, and if he had means of discovery in his power, he will be held to have known it. *Shelby County v. Bragg*, 135 Mo. 300. (c) A party cannot avail himself of the exception to the statute where the means of discovering the truth were in his power and not used. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. *Shelby County v. Bragg*, 135 Mo. 300; *Callan v. Callan*, 175 Mo. 361; *State ex rel. v. Yates*, 231 Mo. 276; *Johnson v. Railways*, 243 Mo. 278; *State ex rel. v. Hawkins*, 103 Mo. App. 251; *Brady v. Insurance Co.*, 180 Mo. App. 214. (d) Mere silence will not excuse the failure to discover the fraud or concealment. *Hoester v. Sammelmann*, 101 Mo. 619; *Stark v. Zehnder*, 204 Mo. 453; *Scott v. Boswell*, 136 Mo. App. 610; *Shelby County v. Bragg*, 135 Mo. 291; *Schrock*

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v. Duncan, 189 S. W. 610. (3) The mere fact that plaintiffs looked upon and considered defendant, Lyons, as a personal friend, in no wise created or constituted a confidential relation, and he did not sustain any such relation within the law. "He was at most but a friend of the family and received no compensation whatever for his acts in assisting them," in the purchase of the real estate. Knight v. Rawlings, 205 Mo. 434. (4) The court erred in excluding evidence offered by defendants, showing that the fair market value in 1911 of the real estate in question was four thousand dollars per acre. This evidence was competent for the purpose of showing that plaintiffs suffered no damages. (a) The terms of the contract were reduced to writing, and the written contract, which is in no wise challenged, speaks for itself. The measure of damages in action of this character is the difference between the reasonable market value of the thing sold and the contract price thereof. Thompson v. Newell, 118 Mo. App. 405; Pickett v. Wren, 187 Mo. App. 89; Vlatis v. Catsignianis, 202 S. W. 441. (b) But in this action it cannot be said that the price paid by defendants indicates the market value any more than the price paid by plaintiffs to defendants. "It is axiomatic that fraud, to be actionable, must result in damages to the parties suing therefor. Stacey v. Robinson, 184 Mo. App. 64. The burden was upon plaintiffs to prove that they suffered damages recoverable under the rule stated above." Vlatis v. Catsignianis, 202 S. W. 441. (5) The court erred in refusing instruction numbered M, tendered by defendants and refused by the court. The substance of this instruction is that if the real estate in question was of the actual value of \$3,000 per acre at the time plaintiffs made the purchase then the verdict must be for the defendants. This is the rule of law as announced in: Thompson v. Newell, 118 Mo. App. 405; Vlatis v. Catsignianis, 202 S. W. 441. (6) The court erred in refusing to give instruction numbered R, tendered by the defendants. This instruction stated "that there is no element of partnership in this case." This instruction ought to have been given.

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The plaintiffs, throughout their testimony, call the deal one of partnership, which undoubtedly had its effect upon the jury in returning a verdict for plaintiff. Sec. 2783, R. S. 1909. An essential allegation is that plaintiffs were deceived, but their petition will be searched in vain for such an allegation.

*Cooper, Neel & Wright* for respondents.

(1) The pleadings in the case state a complete cause of action against each of the defendants. *Remmer v. Remmer*, 217 Mo. 557; *Judd v. Walker*, 215 Mo. 335; *Monmouth College v. Dockery*, 241 Mo. 554; *Corder v. O'Neill*, 176 Mo. 436; *Rutledge v. Tarr*, 95 Mo. App. 268. (2) The Statute of Frauds has no application to the case. *Corder v. O'Neill*, 176 Mo. 437. Besides it is an affirmative defense and must be pleaded to be availed of. *Morrmeister v. Hannibal*, 180 Mo. App. 725; *Phillips v. Hardenburg*, 181 Mo. 473. (3) The pleadings sufficiently stated the facts in reference to concealment. *Monmouth College v. Dockery*, 241 Mo. 555. (4) The petition was sufficient as to the allegations of diligence. *Monmouth College v. Dockery*, 241 Mo. 552; *Cottrell v. Krum*, 100 Mo. 403; *Bent v. Priest*, 86 Mo. 489; *Kelly v. Peoples*, 182 S. W. 808; *Hunter v. Hunter*, 50 Mo. 452. (5) The statements made by Lyon and Meyn as to what was being paid for the land in question and as to its value, etc., are actionable. *Johnson v. Gavitt*, 86 N. W. 256; *Bergeron v. Miles*, 60 N. W. 783; *Kelly v. Peoples*, 182 S. W. 811; *Dorr v. Cory*, 87 N. W. 684. (6) Plaintiffs were damaged and the correct measure of damage was sued for and recovered in this case. *Bergeron v. Miles*, 60 N. W. 783; *Mayo v. Wahlgren*, 50 Pac. 40; *Johnson v. Gavitt*, 86 N. W. 256. (7) Under the statutes and decisions of the State of Kansas, as well as of Missouri, the Statute of Limitations does not begin to run until the discovery of the fraud and the Statute of Limitations is no defense under the facts in this case. Statutes of Kansas, 1915, sec. 6907; *Klamm v. Claus*, 67 Pac. 542; *Brown v. Brown*, 64 Pac.



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601; *Marborough v. McCormack*, 23 Kan. 43; *Perry v. Ray*, 2 Pac. 787; *McMillen v. Winfield*, 67 Pac. 892; R. S. Mo. 1909, sec. 1889; *Monmouth College v. Dockery*, 241 Mo. 551; *Hunter v. Hunter*, 50 Mo. 452; *Cottrell v. Krum*, 100 Mo. 402; *Judd v. Walker*, 215 Mo. 330; *State ex rel. v. Hawkins*, 103 Mo. App. 254; *Bent v. Priest*, 86 Mo. 475. (8) The demurrers in the case of both defendants were properly overruled. *Judd v. Walker*, 215 Mo. 335; *Corder v. O'Neill*, 176 Mo. 436; *Rutledge v. Tarr*, 95 Mo. App. 268. (9) The testimony as to the market value of the land was immaterial and properly excluded. *Johnson v. Gavitt*, 86 N. W. 256; *Bergeron v. Miles*, 60 N. W. 783. (10) The court correctly gave plaintiffs' instruction numbered 3. *Bergeron v. Miles*, 60 N. W. 783; *Rutledge v. Tarr*, 95 Mo. App. 268; *Mayo v. Wahlgren*, 50 Pac. 44; *Jefferson City Savings Assn. v. Morrison*, 48 Mo. 274; *Caldwell v. Henry*, 76 Mo. 257; *McBeth v. Craddock*, 28 Mo. App. 398; *Arthur v. Wheeler and W. M. Co.*, 12 Mo. App. 341. (11) The verdict and judgment are for the right parties and should be affirmed. *Judd v. Walker*, 215 Mo. 333; *Monmouth College v. Dockery*, 241 Mo. 522.

WHITE, C.—The plaintiffs, in the Circuit Court of Jackson County, June 6, 1917, in an action for fraud and deceit, recovered judgment against the defendants in the sum of \$11,835.95, and the defendants appealed. The suit was begun against Lyons and Fred Meyn, and afterwards, on the suggestion of the death of Meyn, his administrator, Strother, was made party defendant, and an amended petition was filed.

The amended petition on which the trial was had alleged in substance that in June, 1911, and for a long time prior thereto, the plaintiffs were well acquainted with Lyons and Meyn and reposed confidence in them; that in the forepart of June, 1911, Lyons and Meyn represented to plaintiffs that they had an offer of two tracts of land in Kansas City, Kansas, comprising 10,814 acres, for sale at a price of \$3,000 per acre; that the land was easily worth the price; that Lyons and Meyn were well acquaint-

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ed with such values, and the land could not be bought for less money; that they desired the plaintiffs to go in with them in the purchase of said land at \$3,000 an acre, in which the plaintiffs were to take a half interest and pay one-half the purchase price; that the plaintiffs had no knowledge of the value of such land and relied upon the representations of Lyons and Meyn as to the value of the land and the price to be paid for it; that afterwards Lyons and Meyn represented that they had bought the land at \$3,000 per acre, and requested the plaintiffs to pay one-half the purchase price; and the plaintiffs, relying upon the truthfulness of the statements, paid to Lyons and Meyn one-half of the supposed purchase price of three thousand dollars per acre, a total sum of \$16,200; that Lyons and Meyn secured title to the property and caused the same to be conveyed to said Meyn; that Meyn thereupon transferred to Frank Thompson, for the benefit of the plaintiffs, an undivided one-half interest in the same; that the land was not worth \$3,000 per acre; that instead of Lyons and Meyn paying for the land \$3,000 an acre, or \$32,442, as they fraudulently stated to the plaintiffs, they paid for all of said land only \$14,920 or \$1,362.29 per acre; that Lyons and Meyn paid the entire purchase price out of the money plaintiffs paid, and retained \$1,280 themselves; that plaintiffs first learned in May, 1916, that the said representations were false; that by reason of the said fraud the plaintiffs were defrauded out of the sum of \$8,740 on the 11th and 19th of July, 1911, and ask judgment for that sum, with interest.

The defendants filed separate answers, each substantially setting up the same defense. After a general denial it is alleged in defense that the facts stated in the amended petition arose wholly in the State of Kansas and are governed by the laws of Kansas. The answers then set up in bar of the action the Statute of Limitations of Kansas as follows:

“Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued and not after-

wards. . . . (3) Within two years; . . . an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.”

The answers further set up in defense the Statute of Limitations of the State of Missouri in that the cause of action accrued more than five years before, and that the plaintiff knew, or by the exercise of reasonable diligence could have known, all the matters alleged in the petition more than five years prior to the commencement of the suit, and for that reason the action was barred by both the Statute of Limitations of Kansas and the Statute of Limitations of Missouri.

In reply to each separate answer the plaintiffs denied each and every allegation in the answers contained except that Strother was the administrator of Fred Meyn; denied that the cause of action was barred by the Statute of Limitations, and alleged that “the facts constituting fraud, pleaded in plaintiff’s amended petition, were not discovered by plaintiffs until June, 1916, and a few days prior to the institution of this suit, and that defendants Lyons and Meyn concealed said fraud and the matters, facts and things constituting the same, as well as any means or sources of information, by or through which plaintiffs, by the exercise of ordinary diligence could have discovered same.” The reply further alleged that by reason of the relation that existed between plaintiffs and defendants, and by reason of the confidence plaintiffs reposed in defendants, and by reason of the statements of defendants, and each of them, plaintiffs were induced not to let themselves be known in said transaction and not to make any inquiry concerning the same.

A trial by jury resulted in a verdict and judgment for plaintiff for the amount sued for, with six per cent interest from the date the money was paid.

Hugh Thompson, one of the plaintiffs, testified that he had known defendant Timothy J. Lyons in the Philippine Islands; had been there in the war and had known him since 1902; that he had known Meyn about the same

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length of time; that he lived two and a half or three blocks from Lyons and saw him probably every evening prior to June, 1911. He first got acquainted with Lyons when Lyons was running for alderman in the sixth ward in Armourdale, and he assisted and spent money in helping elect him. Witness had a nickname of "Frock" by which Lyons called him. He related the statements of Mr. Lyons to him, as follows:

"I met Mr. Lyons another evening, and he said, 'Frock, do you want to make some money, you have always helped me in political matters, and I want to make you a lot of money,' and I said, 'How is that, Tim;,' and I commenced laughing, and he said, 'There is a piece of land out here I can buy for \$3,000 an acre, and I want you to go in with me, and Frank and Meyn, and buy that.' I said, 'Let's go out and look at it,' and we jumped in the car and went out and looked at it, and I said, 'Is it all right, Tim?' and he said, 'Yes, it is a good buy,' and I said, 'All right, Tim, go ahead and buy it,' and it was \$3,000 an acre. They went ahead and bought the ground."

Witness stated that his brother was present and heard the conversation; witness then stated further, when himself, his brother and Lyons were present:

"Q. Go ahead and state what occurred at the time the three of you went out there? A. Tim said, 'I and Fred Meyn can buy this ground for \$3,000 an acre.' He said, 'We have not enough money to buy it, and I want you boys'—he kept talking to me all the time, he was not very well acquainted with Frank, because Tim and me had been friends and I considered him one of my friends, and up to today I have not had the abstract examined to that property,—

"Q. (Interrupting) When he said, 'You boys,' who was it he referred to? A. To Frank and I. He said, 'I want to make you boys some money,' and I said, 'Is this property worth the money?' and he said, 'Yes, it is cheap.' He said, 'Fred Meyn and I will buy this property, and we want you to go in with us, but we don't want you to be known in the deal until we get the abstract.'

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"Q. Was there any talk as to what interest you would have in the property? A. One-half interest.

"Q. One-half to whom? A. One-half to the two Thompsons, and one-fourth to Mr. Fred Meyn, and one-fourth to Mr. Tim Lyons, and I said, 'Why don't you want me to be known in the deal?' and he said, 'I am County Commissioner, and Fred Meyn is president of the Drainage Board'—or a member of the Drainage Board—and for the Stock Yards Company we have done a lot of favors, and we can get this cheaper by your not being known in the deal.' . . .

"Q. What part of the money were each of you to put up? A. We were each to put up one-half; the Thompsons were to put up one-half, and Mr. Fred Meyn one-fourth, and Mr. Tim Lyons one-fourth.

"Q. On what basis per acre? A. \$3,000 per acre.

"Q. Now, did you have any subsequent meeting at which any of you were present, if so, which ones? A. We did meet several times in front of Mr. Lyons's and talked it over.

"Q. Was Mr. Meyn present at any of those meetings? A. Yes sir."

In relating a conversation when Meyn was present, he continued:

"A. In the evening we met there in front of Mr. Lyons's house, and Mr. Meyn said, 'Now, this is a great buy'—

"Q. (Mr. Neel): Not what Mr. Meyn said. A. Mr. Lyons said, 'This is a great buy, and I would not let no one else in on this at all, because there is a man by the name of Rieger, of the Rochester Brewing Company, wanted in on this, but he never helped me like you have in politics, and I want you in,' that is what Mr. Tim Lyons said. . . .

"Q. Any other conversation in the presence of Mr. Meyn, not what he said. Any conversation when he was present, between you and your brother or Mr. Lyons? A. Mr. Lyons said that they were members of the Drainage Board and members of the County Commissioners,

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and they didn't want us known in the deal until it was closed up.

"Q. At any time when Mr. Meyn was present was the purchase price referred to? A. At \$3,000.

"Q. And when Mr. Meyn was present, was anything said between you and Mr. Lyons, or your brother and Mr. Lyons, as to what interest you would have? A. One-half interest. . . .

"Q. Now, how long did these talks and negotiations prolong, Mr. Thompson, before any check was given? Approximately, I mean? A. Three or four days.

"Q. Now, was there any talk back and forth between yourself and Mr. Lyons going over this matter, between the first two or three conversations that you have spoken about, and the time the check was given, if one was given? A. Oh, yes; we talked every evening, or practically every evening.

"Q. Was Mr. Meyn present at any of those subsequent times? A. Yes sir."

Thompson further stated that Lyons told him the trade was closed and the property had cost \$3,000 an acre, and requested a check for plaintiffs' half of the purchase price.

Plaintiffs also introduced a check signed, "J. L. Thompson by H. A. Thompson," dated July 11, 1911, for \$15,600 payable to Fred Meyn and T. J. Lyons, endorsed on the back, "Paid 7-12-11. T. J. Lyons" and "Fred Meyn." Thompson swore he gave that check to Lyons and Meyn and that they went to the bank and got the cash on it; also a check signed in the same way, dated July 19, 1911, payable to Fred Meyn for \$600, and endorsed on the back "Fred Meyn;" also a receipt signed by Lyons and Meyn dated July 11, 1911, for \$15,600 for an undivided half interest in a tract of land containing 10.4 acres in Kansas City, Kansas, which Thompson swore was given when the check in the amount named was delivered.

Thompson further stated that after he had paid \$15,600, Lyons came to him and said there was a mistake in the amount of land, and that Thompson owed

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\$600 more. He thereupon gave the second check for \$600 to Fred Meyn. Lyons again told him that the ground cost \$32,400; that they were all in partnership and that the witness and his brother owned each a fourth; that Lyons owned a fourth and Fred Meyn a fourth.

On cross-examination the witness went over the testimony in detail, stating that all four of the parties, the plaintiffs and Lyons and Meyn, had talked over the land trade, and that in one of these conversations plaintiff told Lyons that he would trust him and they would go in together as partners; that Lyons said the land could not be bought for less than \$3,000 per acre. C. F. Thompson swore the plaintiffs relied upon Lyon's honesty and ability and made no investigation.

On July 11, 1911, the Commercial Bank of Kansas City showed a credit to T. J. Lyons of \$15,600.

Plaintiff offered a deed dated July 20, 1911, from the Kaw Valley Town Site & Bridge Company to Fred Meyn, conveying the land in question for a recited consideration of one dollar.

Also a deed dated July 20, 1911, by Meyn and wife, conveying to Thompson a half interest in the land; also a deed dated the same day and recorded on that date, from Meyn and wife to Lyons, for an undivided one-fourth interest reciting a consideration of one dollar.

John W. Merchant, sworn on behalf of plaintiff, testified that the two tracts of land covered by the deed comprised ten acres and a fraction; that he represented the Kaw Valley Town Site & Bridge Company; the amount paid for the land conveyed by the deed was \$14,920, and he delivered the deed to Fred Meyn; that at the time he made the deed Meyn asked him to make two extra deeds, one conveying a half interest and one conveying a quarter interest, leaving the names blank; he made these deeds and Meyn took them away with him.

C. F. Thompson was sworn and his evidence supported the testimony of his brother in the essential

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facts of the transaction. Other witnesses were produced to corroborate the same details of the transaction. Thompson swore also that plaintiffs did not learn the real consideration paid to the Kaw Valley Town Site & Bridge Company until a short time before the suit was filed.

Fred Meyn was dead at the time of the trial. Defendant Lyons was sworn as a witness and contradicted in detail the testimony of both plaintiffs as to the main issues in the case. He testified in substance that he had contracted to buy two acres of the land in controversy at the rate of \$3,000 per acre, and that to accommodate plaintiffs he agreed to take in lieu of same one-fourth of the entire tract; that he received a deed for his one-fourth and paid Meyn therefor at the rate of \$3,000 per acre; that he never received any profit over and above that which he paid for his one-fourth interest.

On cross-examination Lyons admitted that he never paid Meyn anything for his one-fourth interest at the time he got the deed, but claimed that Meyn owed him and the matter was settled between them later.

Defendants also offered testimony to show that the value of the land in July, 1911, was \$3,000 per acre. Part of this evidence was excluded by the court.

The county record and assessment list for 1910-11 was offered in evidence by defendants, and excluded by the court at the instance of plaintiffs. The record and assessment list disclosed that the 10.81 acres in controversy was assessed for 1910 and 1911 at \$30,000.

I. Appellant complains that the petition does not  
**Cause of** state a cause of action for fraud and deceit and  
**Action.** that the evidence for plaintiffs does not make out a case.

There was no demurrer to the petition, which is set out in substance above, and no objection to its sufficiency taken by motion or otherwise until evidence was offered in its support; then defendants objected to the introduction of any evidence on the ground



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that it didn't state facts sufficient to constitute a cause of action; it was good against an objection taken in that manner. It stated definite facts constituting the false representations, to-wit, the purchase price of the land to be bought, and that such representations were false. It stated with sufficient clearness that plaintiffs relied upon those statements and thereby were induced to make the purchase and pay for their half interest more than the total price for the whole.

The evidence as briefly stated above shows that the allegations of the petition were supported. There was substantial evidence to show that the false representations alleged actually were made, that the money actually was paid by plaintiffs and received by the defendants; that the plaintiffs were deceived by the representations and thereby induced to part with the money. The defendants denied the allegations of the petition and introduced testimony tending to controvert the truthfulness of the statements made by the plaintiffs and their witnesses. Whether in fact the evidence offered by plaintiff was true was a question for the jury to determine, and by their verdict the jury found it to be true. That finding is conclusive upon this court.

II. Appellant correctly says the Kansas Statute of Limitations applies to the cause of action stated, because the transaction occurred in Kansas. [Sec. 1895, R. S. Mo. 1909.] The Kansas Statute of

**Limitations:**  
**Fraud: Diligence.** Limitations provides that a suit can only be brought within two years "in an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." It is claimed that the statute bars the action in this case because there was no pleading, nor facts proven, to show there was reasonable diligence used to discover the fraud.

Kansas cases are cited construing the statute. Those cases hold in effect that where the means of knowledge is within reach of the party defrauded he is presumed to have knowledge of the fraud. In each

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one of them, however, *there was constructive notice*; that is, there was an administrator's settlement, or the record of a deed, showing the facts which were concealed from the party defrauded. The rule obtaining in Kansas is laid down in the case of *Hutto v. Knowlton*, 82 Kan. 445, l. c. 448, as follows:

"Where a public record is required by law to be kept as a source of information respecting property-rights and interests, a duty rests upon anyone to whom the information is material to improve with diligence the opportunity of learning that which the record discloses. . . . But the rule is no broader than its basis, and if for any reason no obligation exists to consult the record, or if the interested person be circumvented from taking advantage of his opportunity, the rule does not obtain.

"There is no obligation resting upon a landlord to watch the records for tax deeds fraudulently taken out by his tenant [citing cases]. Where fiduciary relations exist requiring the disclosure of the true state of facts there is no reason to anticipate unfaithfulness, and the obligations to search the records is relaxed [citing cases]. Likewise, if a party be prevented by fraud from availing himself of the benefit of the record, or be led by such means to forego an investigation of the record, no one participating in the fraud can insist upon the enforcement of the duty to do so. We have here just such a case. The records were not accessible to the appellant, who lived in a distant state. Ellis understood to impart the very information, which if his statements were true, the records would have furnished. The appellant had no reason to question his veracity, and the law did not oblige her to do so. She had the right to accept his representations as true, and to rely upon them as faithful disclosures of what she would discover from the records if she consulted them."

It is claimed here that the records of the Kaw Valley Town Site & Bridge Company showed the actual consideration which Fred Meyn paid for the property was \$14,920, instead of more than \$32,000 as represent-

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ed by him. But the plaintiffs had no access to the books of that corporation, no right to examine them and in fact no right to ask anyone in custody of them what they showed. It wasn't a record which imparted notice to them.

It is true the deed of the company to Meyn recited a consideration of one dollar and that appears of record and imparts notice, but it did not impart notice of any fraud. It is held by the Kansas Supreme Court in the case of Kline v. Cowan, 84 Kan. 776, that a record imparts only notice of what it contains. The court says:

"But where the recorded instrument, as in this case, furnishes no evidence of the fraud, constructive knowledge thereof cannot be imputed."

And in the case of Underwood v. Fosha, 96 Kan. l. c. page 551, the Supreme Court of Kansas said: "The record of the deed imparts notice of everything contained therein. It does not impart notice of matters wholly outside the deed."

Doubtless the plaintiffs knew from the start that the deed executed by the corporation recited a consideration of one dollar and it was at that very time they were told by defendants that the consideration was in excess of thirty-two thousand dollars. The deed did not disclose the real consideration, and it would not suggest any reason for failure to state the true consideration other than that which often prevails in real estate deals—that it might facilitate a further negotiation of the land. The fact that the true consideration was not stated would not necessarily require the plaintiffs to make any further inquiry than *to ask their friends*, with whom they were in partnership and whom they trusted, what the real consideration was. So there was no showing which would set the Kansas Statute of Limitations in operation.

Applying the Missouri doctrine to the facts, the case most favorable to appellants is Hays v. Smith, 213 S. W. 455. In that case it was represented to the plaintiff that a certain tract of land could not be bought for less than seventy-five dollars an acre and he was in-

duced to pay that for it, when in fact the agent who made the representations paid only fifty dollars an acre for it. It was held that the statute began to run from the time the trade was made, because the plaintiff should have discovered the fraud that had been practiced upon him. In that case the party who made the representations was not the agent of the purchaser, but the agent of the seller. Plaintiff himself testified that inside of a year he learned that the land would sell for fifty to sixty dollars an acre. He learned all about the land and knew that it was not worth what he paid for it. The opinion in that case also emphasizes the fact that the purchaser was dealing with the agent of the other parties at arm's length; his suspicions were aroused at the start, and he says he was "juberous" about the land being worth what he paid for it when he made the trade, and that he didn't care about asking the price of the land because he didn't want to make the agent out a liar in the presence of the owner. A number of circumstances in that case suggested to the purchaser that he should make inquiry.

That case differs from the present case in all these particulars. Here the parties making the representations were partners of the plaintiffs. Plaintiffs had a right to rely upon their representations. Not a single fact was brought to their knowledge which would tend to arouse suspicion that their partners were not dealing in good faith with them. It is even pointed out by appellants that the land was actually worth \$3,000 an acre, so that any inquiry regarding values would not have revealed the fraud.

This court has announced the same doctrine as the Kansas courts of constructive notice being equal to actual notice of the fraud so as to put the Statutes of Limitations in operation. [Hudson v. Cahoon, 193 Mo. 547.] But has also laid down certain principles which govern the application of the statute. In the case of *Monmouth College v. Dockery*, 241 Mo. 522, l. c. 552, the court said:

"If there was nothing in the transaction at the time, or nothing occurring later, to cause a reasonably prudent man to suspect fraud, he is not guilty of negligence in failing to ferret it out."

On page 559 the same opinion, quoting from an Illinois case, says:

"The failure to use ordinary diligence to discover the fraud may be excused where there exists some relation of trust and confidence, as principal and agent, client and attorney, *cestui que trust* and trustee between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and when it appears that it was through confidence in the party who committed the fraud that the other was prevented from discovering it."

On the same page the court approved of another case where the relation of confidence was that of a partner, and the court says in the case of the partner, l. c. 559:

"But here there was a positive representation made by a party whose position required of him the utmost good faith, and that representation was a concealment of the cause of action. Whatever may be the rule where no relation of trust and confidence exists, we are clear that where the relation does exist, as in this case, the bar of the statute cannot avail the party who misleads his partner."

A still later case, *Laird v. Keithley*, 201 S. W. 1138, l. c. 1142, in the opinion of Judge WOODSON, this court held:

"It is next insisted that, even though the respondent did not know of the fraud at the time of the completion of the trade, yet by the exercise of ordinary and reasonable care and prudence he could have ascertained the fraud before the five years expired, and for that reason the demurrer should have been sustained. This insistence is equally untenable. The respondent testified that he relied entirely upon the representations made to him by appellant and his agents regarding the char-

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acter of the soil and the productions of the Ralls County land, and that he did not rely upon his own observations, which, the evidence tended to show, were hurried, casual and limited, a mere bird's-eye view, and in no sense an inspection of the land within the meaning of that term; also that certain material facts were concealed from respondent, which, coupled with the misrepresentations mentioned, threw him off his guard and lulled him into the belief that the Missouri farm was as represented to him. Under those conditions the law is well settled that the defrauded party is under no legal obligation to investigate the honesty of the transaction, but may rely upon the representations of the vendor to be true."

The weight of authority is against the position taken by appellant in regard to plaintiff's duty in discovering the fraud.

III. It is claimed by appellants that the pleading of plaintiffs in avoidance of the Kansas Statute of Limitations was insufficient to show reasonable diligence in discovering the fraud. The petition stated

**Pleading:** that the fraud was not discovered until June,  
**Diligence.** 1916.

This court in the case of *College v. Dockery*, 241 Mo. l. c. 554, said, in a case of this character:

"If the plaintiff merely states that he did not discover the fraud until a certain date, and the defendant, without questioning the sufficiency of the pleading, goes to trial on that issue, . . . he cannot, on appeal, complain of the defect in the pleading."

The court then further said: "There was no demurrer filed in this case, and no objection to the evidence on the specific ground of this alleged defect," and held the pleading sufficient.

In this case the petition was sufficient, and besides the replies averred that the facts "constituting the fraud pleaded in the plaintiff's amended petition were not discovered by plaintiffs until June, 1916." The replies further alleged that plaintiffs were misled and

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prevented from discovering the fraud, and that the defendants concealed the fact from which it might have been discovered.

Before any testimony was introduced the defendants' counsel objected to the introduction of any evidence on the ground that the petition did not state facts sufficient to constitute a cause of action and mentioned several specific objections to the petition, but did not state any objection on the ground that it contained no allegation of facts which would remove the bar of the Statute of Limitations. The replications of the plaintiffs were not mentioned in any objection as being insufficient in any particular. It will be noted the plaintiff did not need to plead such facts in the petition because the Statute of Limitations of Kansas was not in issue until pleaded in the answer; then such facts were properly pleaded in reply, and no objection to the sufficiency of the reply was made.

IV. The appellants claim that the Missouri Statute of Limitations would bar the action. In addition to what is said above it may be noted that this action was begun June 27, 1916. The trade was actually closed up and the fruits of the fraudulent transaction received by the defendants about July 20, 1911, so the suit was actually begun within five years from the time the trade was closed.

**Limitations:**  
**Missouri Statute:**  
**Death of Defendant.**

But the appellant claims, inasmuch as the petition was amended, making Strother, administrator of Meyn, defendant, at the September term, 1916, and since the trade was consummated in July, 1911, that more than five years had elapsed before Strother was sued, and therefore the suit as against him is barred.

The amended petition alleges that Fred Meyn died the twenty-second day of April, 1916. There is nothing to show when his administrator was appointed. It appears to have been after the suit was begun and immediately before the amended petition was filed. The time elapsing between the death of the decedent and the

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appointment of his administrator is excluded from the computation of time the Statute of Limitations runs. [Nelson v. Haeberle, 26 Mo. App. 4; McKinzie v. Hill, 51 Mo. 303; Little v. Reid, 75 Mo. App. 266, l. c. 269; Hinshaw v. Warren, 167 Mo. App. 365, l. c. 368.] There seems to be an interval of three or four months between the death of Meyn and the appointment of his administrator during which the statute did not run.

V. Another reason urged why plaintiffs should not recover is that they, with the defendants, had entered into an illegal contract or scheme, out of the operation of which scheme the liability arose.

Fraudulent  
Scheme.

An instruction was asked by defendants directing the jury to find for defendants "if the plaintiffs and defendants purchased the land in controversy with the understanding that the defendants were to use their official positions for the sale thereof." The court gave the instruction after adding: "unless the defendants acted fraudulently as set out in other instruction." That action of the court, appellant claims, was error.

Mr. Lyons represented, so the evidence goes, that on account of his office he knew the inside of all the work of the railroad and the Terminals, and this was a piece of ground they expected daily the Terminal would buy. He also stated that they were members of the Drainage Board and for that reason did not want the plaintiffs known in the deal.

The appellants cite a number of cases where the courts have refused to enforce contracts based on lottery schemes, gambling arrangements, and immoral or unlawful undertakings. None of these cases are in point because this is not an action to *enforce a contract*, nor *for the breach of a contract*. It is an action for fraud and deceit. While the courts refuse to grant relief to either party in a suit on a contract which is against public policy, yet where one of the parties is defrauded by reason of the transaction he may recover for fraud and deceit. [McNamara v. Gargett, 68 Mich. 454, l. c. 462;



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Hess v. Culver, 6 L. R. A. 498; 12 R. C. L. top page 399.] The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, or alleging fraud in being induced to enter them, is pointed out in numbers of cases. [McBlair v. Gibbes, 58 U. S. 231, l. c. 235-7; Smith v. Blachley, 68 Am. St. 887, l. c. 891.] The Supreme Court of Kansas has passed upon this proposition in the case of Jones v. Inness, 32 Kan. 177, l. c. 181. In that case one person made another drunk and while the latter was under the influence of liquor, induced him to bet on a game of cards and obtained his money in the gamble. Gambling was contrary to law and the whole proceeding was illegal, yet plaintiff could recover on account of the fraud. So, also, Hall v. Corcoran, 107 Mass. 251, l. c. 256; Loomis v. People, 67 N. Y. 322.

This court had occasion to pass upon this very question in case of Hobbs v. Boatwright, 195 Mo. 693. That was a suit to recover six thousand dollars on the ground that it was obtained by a fraudulent scheme of the defendants. It was shown that the plaintiff was induced to bet on a foot race to be "framed" so that he would win. The race was "framed" but so that he *lost* the six thousand dollars. The court explains the principle, pp. 727-728:

"The petition states in substance that the defendants Boatright and others had, prior to the grievance complained of, conspired to have what it calls fake foot races run at Webb City on which strangers were enticed to bet and that the races were so fixed in advance that whichever one of the racers a stranger should bet on was sure to lose, that schemes to entice strangers were devised, and that plaintiff was caught in one of these schemes and inveigled into putting \$6,000 into the hands of Boatwright as stakeholder on what plaintiff supposed was a race, with the result that the man he bet on, who was one of the conspirators, was beaten in the race, as it was previously agreed between him and his co-conspirators he would be, and so plaintiff lost his money, and that the defendants, the Exchange Bank

and J. P. Stewart, aided and abetted Boatright and his gang in perpetrating the fraud.

"If the petition was intended to state a cause of action under Section 3424 as for money lost at gambling, there is a good deal more of it than necessary. Fraud or unfairness in the game is not essential to the right of action given by that statute; and on the other hand, if there was no such statute the petition states a right of action at common law, that is, that defendants Boatright and others obtained the plaintiff's money by a fraudulent scheme in which they were assisted by the bank and its cashier Stewart. That is that the petition means."

In this case, if, by some stretch of construction, it may be said that plaintiffs were led to enter the deal because defendants represented that they would unlawfully procure a sale of the land on account of their official positions, the plaintiffs probably could not have enforced the contract in any kind of an action; but, if the defendants by misrepresentations of certain facts induced the plaintiffs to enter the illegal contract and defrauded them of their money, they can't resist recovery on the ground that the scheme was unlawful.

VI. The defendants asked an instruction directing the jury that if at the time the plaintiffs bought, the land was reasonably worth three thousand dollars an acre they should render a verdict for the defendants.

**Measure of Damages.** The court refused the instruction, and it is claimed the ruling was error. On the measure of damages the jury were instructed, if they found for plaintiffs, to assess their damages at the difference between what the plaintiffs paid Lyons and Meyn for the half interest which they got and one-half of the amount which Lyons and Meyn actually paid the Kaw Valley Town Site & Bridge Company for the entire tract. Appellants claim this was error, and assert that the true measure of damages is the difference between actual value of the land and the price which the plaintiffs paid for it, on the theory that if the land was worth as much

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as the plaintiffs paid for it plaintiffs were not damaged.

The measure of damages for misrepresentations inducing the purchase of land, or other property, depends upon the nature of the misrepresentations. If the false statements which induced the trade were as to quality, condition or any fact which would enter into the value of the land, the measure would be the difference between the actual value and the value as it would have been if the property had been as represented. [Sigafus v. Porter, 179 U. S. 116; Stoke v. Converse, 38 L. R. A. (N. S.) 465, note.] But where one person makes a purchase for another, or where one of two or more joint purchasers conducts a joint purchase, and falsely represents to the others that the price is greater than is actually paid for the property, the measure of damages is always the difference between the amount actually paid by the party defrauded and the true purchase price of the interest which he acquired. [Pickett v. Wren, 187 Mo. App. 83; 20 Cyc. 141; Johnson v. Gavitt, 114 Iowa, 183; Bergeron v. Miles, 88 Wis. 397; Rutledge v. Tarr, 95 Mo. App. 265, 268; McLain v. Parker, 229 Mo. 68. See also case of Pendergast v. Reed, 96 Am. Dec. 541.]

Appellants cite the case of Thompson v. Newell, 118 Mo. App. 405, l. c. 415-16, in support of their position that the measure of damages was the difference between the actual value and the amount paid. That case, as some other cases, holds that where a seller induces a purchaser by misrepresenting the price which the article sold cost *him*, that is the measure of damages unless the original cost enters as a term in the contract. It will be seen from the discussion of the principle on page 415 of that case that the correct rule as stated above is approved. This was not a case where the defendants sold the land to plaintiffs by simply stating what it had cost them at some previous time. The plaintiffs and defendants went in together as joint purchasers; the defendants acted for the plaintiffs in the matter; and in every case where the facts are of that nature the measure of damages is as stated above. The

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plaintiffs in fact were damaged in exactly the amount they paid defendants for the land in excess of what it actually cost. Whether or not they made, or might have made, money on the deal, makes no difference whatever in their right to recover or in the measure of their damages. [Pickett v. Wren, 187 Mo. App. l. c. 90, 91.]

The record before us and the briefs filed show the case was fought through on both sides with great vigor and pertinacity. Some points are made by appellants in regard to matters collateral to the main issues. These are answered by what has been said above.

The judgment is affirmed. *Railey C.*, dissents; *Moxley, C.*, concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

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JOHN H. WITLER et al. v. CITY OF ST. LOUIS,  
TERMINAL RAILROAD ASSOCIATION and  
FRUIN-COLNON CONTRACTING COMPANY,  
Appellants.

Division Two, March 13, 1920.

1. **MEASURE OF DAMAGES: Viaduct: Obstruction of Access.** Where a part of the street, two feet wide, between the seven-foot viaduct and plaintiff's property, had not been elevated but remained as it was before the viaduct was constructed in the street, there is no room in the case for an instruction telling the jury that one measure of plaintiff's damage is the amount of money it would cost to raise the surface of plaintiff's property to a level with the present surface of the viaduct.
2. ———: ———: ———: **Special Benefits.** Where access to plaintiff's property has been completely prevented on the east by the erection of a seven-foot viaduct in the north-and-south adjoining street, and has otherwise been shut off by a ninety-nine-

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year lease of the property on the south, north and west to a railroad company and the inclosure thereof by a fence, there can be no special benefits to their property by the construction of the viaduct, and the court is not authorized to instruct the jury to take special benefits into consideration as a set off to the damages sustained by them.

3. ———. **Interest: Torts; Instruction: Mutual Error.** Where the instructions asked and given for both plaintiff and defendant told the jury to assess the damages, together "with interest on such sum at the rate of six per cent per annum from such date as from the evidence the jury find said obstruction of access" to plaintiffs' property by the construction of a seven-foot viaduct in the adjoining street "was complete," defendant cannot complain that the court instructed the jury to allow interest, even though it be admitted that interest is not allowed in actions *ex delicto*.
4. ———: **Excessive: Contradictory Testimony: Question for Jury.** Where the testimony in regard to the value of plaintiffs' property, and the damages thereto caused by the construction of a seven-foot viaduct in the adjoining public street and the complete obstruction of their access thereto, is exceedingly contradictory, but sufficiently substantial, if believed, to support the verdict, and there is nothing in the record to indicate passion or prejudice on the part of the jury, it is the peculiar province of the jury to ascertain and determine the amount of damage, and the court will not interfere with their finding.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones*, Judge.

**AFFIRMED.**

*Charles H. Daves* and *H. A. Hamilton* for appellants.

(1) Any damage that respondents may have suffered by reason of destroying their access to Adams Street east of Compton Avenue is not an element which the jury might consider in arriving at their verdict because the property in question did not abut on Adams Street east of Compton Avenue. *Dillon on Mun. Corps.* (3 Ed.), sec. 730; *Rude v. St. Louis*, 93 Mo. 408; *Gardner v. St. Joseph*, 96 Mo. App. 657. (2) Special benefits accruing to property from a change of grade of the

street upon which it abuts should be deducted from the damages occasioned by such change of grade, and a refusal to so instruct the jury is error. *Kent v. St. Joseph*, 72 Mo. App. 42. (3) An action for damages resulting from a change of grade is an action in trespass, and the rule is well settled in this State that in actions *ex delicto* interest should not be added to the actual damage suffered by plaintiff. *Gerst v. St. Louis*, 185 Mo. 191; *Simmons Hardware Co. v. St. Louis*, 192 S. W. 394; *Reading v. Railroad*, 188 Mo. App. 41. (4) The verdict of the jury is so clearly excessive that the judgment thereon should be reversed.

*George W. Lubke, George W. Lubke, Jr., and Ferris & Rosskopf* for respondents.

(1) The trial court did not err "in instructing the jury to allow as an element of damage to the property in dispute the destruction of access to Adams Street," because: (a) the court did not so instruct the jury; (b) the evidence shows that the viaduct cut off all egress from and ingress to plaintiff's property, except a narrow alley on the north side, thereby practically bottling up the property, and leaving it in a condition wholly unlike that in the cases cited by appellants; (c) had the viaduct not obstructed Adams Street, respondents' property would not have been bottled up, and in that respect, the obstruction on Adams Street caused peculiar and special injury to plaintiffs' property; (d) in this case "circumstances exist in which the right of access is broader than the boundary lines upon the street of the private owner," and the rule in *Rude v. St. Louis* does not apply. *Gorman v. Railroad*, 255 Mo. 492; *Rude v. St. Louis*, 93 Mo. 415; *Gibbons v. Railroad*, 284 Ill. 559; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161; *Kansas City v. Cruther*, 214 S. W. 109. (2) Isolation of respondents' property from Adams Street by the viaduct was complained of in their petition, and evidence as to access to Adams Street was freely admitted without objection. Instruction 4 requested by appellants and given by the trial

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court, told the jury, in arriving at their verdict, to "take into consideration all the facts and circumstances in the whole case." Appellants are bound by the position they assumed upon the trial. *Mirrieles v. Wabash*, 163 Mo. 486; *Harper v. Moose*, 114 Mo. 322; *Tomlinson v. Ellison*, 104 Mo. 112; *Menefee v. Diggs*, 186 Mo. App. 662. (3) The trial court properly might have instructed the jury to allow as an element of damage the destruction of actress to Adams Street, because, in the light of the facts and authorities referred to in the paragraph next above, appellants had waived the right to object to such instruction. (4) On the measure of damages, the court gave respondents' instruction number 2, and appellants' instruction number 5, neither of which refers to Adams Street, and both of which confine the consideration to the damage caused by the viaduct adjoining or adjacent to respondents' property. Whether respondents' said instruction number 2 is correct or incorrect, appellants are in no position to complain, as it is in harmony with one given at their own request. *Rourke v. Railway Co.*, 221 Mo. 62; *Kame v. Railroad*, 254 Mo. 197; *Lange v. Railway Co.*, 208 Mo. 475; *Williams v. Gas and Electric Co.*, 274 Mo. 14. (5) Appellant's point that special benefits accruing to respondents' property from the change of grade should be deducted from the damages occasioned by such change, is not well taken, because: (a) the court sufficiently and properly instructed the jury as to the measure of damages in appellants' given instruction 5 and respondents' given instruction 2; (b) the appellants' said refused instruction was properly refused because there was no evidence to support it in respect to the amount of money it would cost to raise the surface of respondents' property, etc. *Home Bank v. Towson*, 64 Mo. App. 100. (6) Appellants' refused instruction was erroneous, and was properly refused. Its effect, if given, would have been to require the jury to twice deduct the special benefits from the damages. *Hickman v. Kansas City*, 120 Mo. 122. (7) The trial court did not err in instructing jury to allow interest on

the damages found, because the appellants' given instruction on the measure of damages told the jury to award interest, and appellants cannot complain of respondents' given instruction in that respect. *Lange v. Railway Co.*, 208 Mo. 475; *Hazell v. Bank*, 95 Mo. 66; *Williams v. Gas and Electric Co.*, 274 Mo. 14. In passing, it is interesting to note that it is the tendency of courts in modern times to award interest in such cases. *Hampton v. Kansas City*, 74 Mo. App. 129; *Cooley on Torts* (Students' Ed.), p. 128; 28 L. R. A. (N. S.) 66, note; 17 C. J. 825-826; *Webster v. Railway Co.*, 116 Mo. 116; 2 *Lewis on Eminent Domain* (3 Ed.), sec. 742, p. 1323.

RAILEY, C.—This action was commenced by plaintiffs, in the Circuit Court of the City of St. Louis, on October 27, 1915. It was tried before a jury upon an amended petition, to which defendants had pleaded by way of general denials. Respondents, in their petition, allege that they are the owners of Lots 26, 27, 28 and 29, in City Block No. 2277, of said city, having a front of 110 feet on the west line of Compton Avenue, and a front of 130 feet on the north line of Adams Street; that said property was bounded on the west by an alley, and on the north by an alley, on which there are now situated, and for many years have been situated, the dwelling buildings, with appurtenances, known and numbered as 319 South Compton Avenue and 3203 Adams Street. It is further alleged in said petition that said land is improved, and that there are erected thereon two substantial brick houses and various sheds, with other appurtenances used in connection therewith; that the City of St. Louis, by Ordinance No. 25,367, approved July 20, 1910, changed the grade of Compton Avenue adjacent to respondents' property and provided for the construction of a viaduct over the railroad tracks, several blocks south of respondents' property; that said viaduct reached the old grade of Compton Avenue at a point ten feet south of the north line of respondents' property; that the viaduct practi-



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cally occupied the entire width of Compton Avenue, and by reason of the construction thereof respondents' access to Compton Avenue was destroyed. The petition also alleges that respondents' access to Adams Street, east of Compton Avenue, but upon which street plaintiffs' property did abut, was also destroyed. It is further alleged that before the building of said viaduct, respondents' property was reasonably worth \$40,000, and that by reason of the construction of said viaduct it has been damaged in the sum of \$25,000, etc.

There was substantial evidence offered upon the part of plaintiffs tending to show that the property in controversy consists of a tract of land lying at the northwest corner of the intersection of Compton Avenue and Adams Street, in said City of St. Louis, having a frontage of 110 feet on Compton Avenue, extending back westward in uniform width 130 feet to an alley, and bounded on the south by Adams Street, and on the north by an alley 15 feet wide. On this land is a two-story brick house facing Adams Street, the south line of which house is twenty-four feet and four inches north of the north line of Adams Street, and the east side of said house is about eight feet from the west line of Compton Avenue. Near the northeast corner of said land is a brick dwelling house, two and one-half stories high, extending to an alley on the north, and extending to within about seven feet of the west line of Compton Avenue. These two dwelling houses stood upon the same ground at the time of the building of said viaduct, for many years before, and were there at the time of trial. Prior to the erection of the viaduct, there were also upon said ground several outbuildings used in connection therewith. At the time of trial, and long prior thereto, the two-story building, facing on Adams Street, was occupied by a tenant, and another tenant occupied the house facing on Compton Avenue.

To the south, west and north of respondents' said tract of land, is a large tract of land, known as the Rankin tract, which had never been improved by the erection

of buildings thereon. Said Rankin tract had been duly platted into lots, streets and alleys, but the streets and alleys had never been used or improved, and existed only on paper.

Adams Street, east of Compton Avenue, was a street duly made, paved with macadam and curbed, and was much used by the public; but west of Compton Avenue it had never been made or paved, and was used as a part of respondents' premises, as far west as said premises extended, 130 feet, and served as an outlet for respondents' premises to Compton Avenue. Adams Street has never been used as a street west of a point 130 feet west of Compton Avenue.

At the time of the building of the viaduct, Compton Avenue was, and for many years prior thereto had been, a well improved thoroughfare, and in the neighborhood of respondents' property, it was paved with granite blocks, having curbing and sidewalk, and was much used for hauling.

At the time of the building of said viaduct, the property on the south side of Adams Street, and east of Compton Avenue, and for a considerable distance south, was used for the purpose of terminal railroad yards. It was filled with railroad tracks, and the latter came up to Adams Street and Compton Avenue, leaving only a space for loading wagons. West of Compton Avenue, there were no railroad tracks north of Adams Street, and none for several blocks south of Adams Street. Adams Street and Compton Avenue, at their intersection, were on a level and of the same grade.

Said Rankin tract extended north of respondents' property one block to Market Street, south of said property from Adams Street, across Bernard Street and Scott Avenue, to Atlantic Street, in which latter street railroad tracks were running east and west, and extending westwardly 800 or 900 feet to Rankin Avenue. Said Rankin tract was a rough prairie, and was used for dairy purposes. About 55 feet west of respondents' property was a creek or drainage outlet, for said tract, about eight feet

deep. Said Rankin tract was enclosed by fences, and respondents' property was cut off thereby on the north, on the west and on the south.

The wall of the viaduct was completed June 21, 1911. The change of grade begins at the northeast corner of respondents' property. The original grade from that point southward, took a downward course from said northeast corner, southward to Adams Street, and the said houses had been built in reference to the original grade. The grade for the viaduct runs higher from that point as it extends southward, so that at the north line of Adams Street the elevation of the deck of the viaduct is seven feet and one and one-half inches above the old grade, and in the middle of Adams Street it was still more. Opposite the south line of the house facing on Adams Street, the deck of the viaduct on Compton Avenue is six feet and five inches above the old grade of the street at that point, and the railing extends three feet and five inches above the deck, and the posts extend to an elevation of four feet above the viaduct, making the total elevation of the railing above the old grade at that point, nine feet and ten inches, and of the railing posts, ten feet and five inches.

The viaduct in front of respondents' property occupies the entire width of Compton Avenue, except about two feet on the west side thereof, leaving a space of about two feet between the viaduct wall and the west line of Compton Avenue. The viaduct in front of plaintiffs' property and extending southward across Adams Street, and for some distance further south, is supported by a solid wall, with a railing on the top and sides of the viaduct. About one block south of Adams Street, the deck of the viaduct is supported by piers or pillars, and assumes the form of a bridge, permitting railroad tracks to run underneath. On the west side of the viaduct, from the north end of the opening under the same to respondents' property, the ground rises 12 feet, and is too steep for switch tracks. The openings under the viaduct to the south of respond-

ents' property, for some distance, are too low for trains to pass through.

The nature and extent of the obstruction caused by the building of the viaduct is more clearly shown by the photographs introduced in evidence by plaintiffs marked Exhibits I, J, K, L, M, and N. Respondents likewise introduced in evidence their Exhibit O, which is a photograph of their property and its surroundings. As everything is sufficiently clear without them, we have not deemed it necessary to incorporate either of said photographs as a part of the statement herein.

Plaintiffs' evidence also tends to show that the effect of the building of the viaduct was to cut off all access to respondents' property from the public streets of the city, except such as might be had through the 15-foot alley on the north side of said property; that prior to the building of the viaduct, the water drained from respondents' property onto the street and was carried away by the gutter; that since that time, the water drains toward the house and settles there.

The Rankin tract, surrounding respondents' property on three sides, not long prior to the building of the viaduct, had been leased for a term of 99 years, to the Terminal Railroad Association, the rental being fixed at about four per cent, on a base valuation of \$3 per square foot.

Respondents examined four witnesses, who testified as to the difference in the market value of their property just before the viaduct was built, and its market value just after its completion. The property in dimensions being 110 feet by 130 feet, contained 14,300 square feet. Mr. Charles W. Honegger, who qualified himself to testify, gave it as his opinion that the net damage to plaintiffs' property by reason of the construction of the viaduct was \$21,450. Messrs. Frederick G. Zeibig, Fletcher R. Harris and James M. Franciscus, who were men of experience in buying and selling all kinds of real estate in said city, each testified that the market value of respondents' property, by reason of the building of said viaduct, was reduced

ed 50 per cent. They valued said property at \$2 per square foot, or \$28,600, just prior to the building of the viaduct, and at \$1 per square foot, or \$14,300, immediately after the erection of the viaduct; a reduction of \$14,300.

The evidence of defendants, in respect to respondents' claim of damages, is stated in substance by appellants upon page 5 of their brief, as follows: The appellants introduced witnesses who qualified as experts on the value of the real estate in question, and these witnesses uniformly expressed as their opinion that, considering the respondents' property as railroad property, it was not damaged by the construction and maintenance of the Compton Avenue viaduct. These witnesses gave it as their opinion that the property, considered as residence or tenement property, was damaged by the construction of the viaduct, but that the benefits accruing to said property from the construction of the viaduct and the subsequent vacation of the public streets between respondents' property and the railroad tracks, which made the same valuable for railroad purposes, more than off-set the damage which the property may have suffered as tenement or residence property.

At the close of all the evidence in the case, appellants asked the court to direct a verdict in their behalf, which said request was refused, and an exception saved.

To obviate a repetition, the instructions given, refused or modified, will be considered, as far as necessary, in the opinion.

On May 8, 1917, during the April Term of said court, the jury returned the following verdict:

"We the jury in the above cause find in favor of the plaintiffs on the issues herein joined and assess their damages at the sum of \$10,000, Ten Thousand dollars, with interest thereon at six per cent, per annum from June 21, 1911, to May 8, 1917, amounting to \$3,528.33, three thousand, five hundred twenty-eight

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and 33-100 dollars, aggregating thirteen thousand, five hundred twenty-eight and 33-100 dollars."

Judgment was entered in due form upon the verdict aforesaid on said 8th day of May, 1917.

Defendants, in due time, filed their motions for new trial and in arrest of judgment. Said motions were overruled and the cause duly appealed by them to this court.

I. Appellants assign four errors, alleged to have been committed by the trial court, to their prejudice, which will be considered in the order presented in their brief, as follows:

"I. The court erred in instructing the jury to allow as an element of damage to the property in dispute the destruction of access to Adams Street east of Compton Avenue, because the property in question did not abut upon that part of Adams Street."

**Damages.** We are not advised in the assignment of errors, nor under appellants' "Points and Authorities," which of the instructions given at the instance of plaintiffs is complained of under this head. We might, therefore, pass this assignment as too indefinite for consideration, but as appellants, in their argument criticise plaintiffs' instruction numbered one, we presume the assignment was intended to cover same.

This instruction is lengthy and covers several questions at issue in the case. In said instruction, the jury were required to find that respondents are the owners of the property in controversy; that Compton Avenue and Adams Street, throughout the year 1911, and prior thereto, were open, public streets or highways, in the City of St. Louis, Missouri; that prior to 1911, the grade of Compton Avenue and Adams Street had been established by said city; that Compton Avenue, in 1911, and prior thereto, had been paved, and improved with sidewalks, gutters and curbing, in accordance with the established grade aforesaid; that appellants, under the ordinance aforesaid, caused the grade of Compton Avenue to be raised and changed, "and changing said grade caused

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said streets to be obstructed by the viaduct or bridge mentioned in evidence, and that thereby the egress from said real estate to said Compton Avenue and to said Adams Street east of said Compton Avenue and the ingress from said streets into and upon said real estate were destroyed, . . . if the jury so find . . . the plaintiffs are entitled to recover from said defendants or any of them who caused said change of grade as aforesaid."

In our opinion, the contention of appellants, in respect to this instruction, is absolutely devoid of merit. It does not deal with the question of damages, presented in other instructions, nor does it directly or inferentially authorize the jury to find that plaintiffs' property was damaged on account of the obstruction in Adams Street.

Before the viaduct was built, plaintiffs had access to Compton Avenue east of their property, and could pass down Compton Avenue, across and into Adams Street. After the viaduct was completed on June 21, 1911, access to plaintiffs' property was cut off from both Compton Avenue and Adams Street on the east. This is what the jury were required to find, and there is no controversy over this question, as shown by appellants, upon page 10 of their brief, where it is said:

"Respondents' property is located on the northwest corner of Adams Street and Compton Avenue, both public streets in the City of St. Louis. The grade of Adams Street was not changed, but remained the same after the construction of the viaduct. There were solid abutments in Compton Avenue and across Adams Street which destroyed respondents' access to Adams Street east of Compton Avenue."

There was no controversy at the trial over the fact that the building of the viaduct on Compton Avenue east of plaintiffs' property, and the extension of same across Adams Street, left plaintiffs' property without any access from the east over either of said highways.

We, therefore, conclude, that plaintiffs' instruction numbered one is not erroneous; that it did not authorize the jury to assess damages in favor of plaintiffs, on

account of the obstruction in Adams Street, nor does said instruction deal with the subject of damages. The above assignment of error is accordingly overruled.

II. Appellants claim, that: "The court erred in refusing to instruct the jury, upon the request of appellants, that they should deduct from the amount of damage caused by the construction of the viaduct, any special benefits which may have accrued to the property by reason of the construction of said viaduct."

This assignment might well be ignored, as it does not designate which instruction, if any, was refused, nor is there anything in the "Points and Authorities" referring to any refused instruction. We find, **Instructions.** however, on perusing appellants' argument, on page 13 of their brief, that the court is charged with error in refusing defendants' instruction numbered 2, which reads as follows:

"The court instructs the jury that in case you find in favor of the plaintiffs, the damages which may be assessed against the city in favor of the plaintiffs may be measured in either one of two ways:

"First, you may take the difference between the reasonable market value of said property immediately before the grade of the street was changed and said viaduct constructed, as shown by the evidence, and the reasonable market value of said property immediately after such change, if you find that the market value after the change was less than the value before, and so arrive at the damages which plaintiff has sustained; in other words, the difference in market value before and after the improvement of the street may be taken as the measure of damages, and in considering the market value after the improvement you shall not take into consideration any general benefits which may have accrued to said property by reason of the improvement, but you shall consider any special benefits, as defined for you in a subsequent instruction.

"Or, second, you may consider the amount of money which it has cost or would reasonably cost the plaintiffs



to raise the surface of their property and the improvements which were on said property at the time of said change of grade, to the same relative position to the present grade as they formerly occupied to the old grade of said street.

“And you are instructed that the defendant, the City of St. Louis, is entitled to have the damages fixed by whichever of the above two methods will show the least amount of damages to have accrued.”

This instruction, as asked, was properly refused by the court for several reasons: First, taken as a whole, there was no evidence adduced at the trial in support of the second paragraph of said instruction. Second, taking into consideration the location of plaintiffs' property and the viaduct on the east of same, with a two-foot space between respondents' property and the viaduct, we are at a loss to understand, as a practical proposition, how plaintiffs' property could have been made of any value by raising it to a level with the viaduct. At least, there was no evidence offered sustaining said theory. Third, we are of the opinion that the instruction was erroneous, in requiring the jury to

take into consideration any special benefits, which it is claimed inured to the benefit of respondents' property by reason of the change of grade and building of the viaduct on Compton Avenue.

Cases may arise in which the principle contended for by appellants should be applied, but this is not one of that class. It is undisputed that before the grade of Compton Avenue was changed, and the viaduct constructed thereon, plaintiffs had abundant access to Compton Avenue on the east side of their property, and likewise had the use of Adams Street, where it is intersected by Compton Avenue. These defendants, by the change of said grade, and the construction of said viaduct, have shut off all access to plaintiffs' property from either Compton Avenue or Adams Street. There is no way of escape for respondents from their property to the southward, none to the westward, and none to the north-

ward, except by a 15-foot alley. The Rankin property, surrounding that of plaintiffs, is held under a 99-year lease by the defendant Terminal Railroad Association, of St. Louis, Missouri. In other words, the property of respondents has been completely bottled up by the acts of appellants, except as to the alley on the north, and yet we are blandly asked to reverse this case because the trial court refused to finish a confiscation of respondents' property, by directing the jury to charge the same with special benefits. Upon the facts presented in this record, it would have been a travesty upon the law to have given defendants' instruction two, as asked.

III. Appellants' third assignment of error, reads as follows:

"The court erred in instructing the jury to allow interest on the amount which they found the property to have been damaged by the construction of **Interest.** the viaduct, because interest is not allowed in actions *ex delicto*."

No mention is made in above assignment as to any particular instruction given, nor is any reference made in the "Points and Authorities" to any such instruction. Even the argument fails to point out any instruction which it is claimed was erroneous. We find, upon turning to the abstract of record, that the trial court, at the instance of respondents, gave instruction numbered 2, and at the instance of appellants gave instruction numbered 5, which read, when placed in parallel columns, as follows:

**PLAINTIFFS' GIVEN INSTRUCTION No. 2.**

"If you find in favor of the plaintiffs, you will assess their damages at such sum, not exceeding \$25,000, as represents the difference, if any, between the reasonable market val-

**DEFENDANTS' GIVEN INSTRUCTION No. 5.**

"The jury are instructed that the measure of damages, if any, sustained by plaintiffs, is the difference in the market value of said property immediately before and after the

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ue of plaintiffs' said property, immediately before and after the raising and changing of the grade of Compton Avenue adjoining plaintiffs' property, and the obstruction of the access thereto by reason of said viaduct or bridge and directly caused thereby, if you so find, together with interest on such sum so found, at the rate of six per cent per annum, from such date as from the evidence the jury find and believe said obstruction of access was complete."

changing of the grade of Compton Avenue on account of the construction of the Compton Avenue viaduct, adjacent to plaintiffs' property, with interest on such sum, if any, at the rate of six per cent per annum from such date as from the evidence the jury find said abutment to said viaduct was complete."

By reason of the foregoing, appellants are in no position to complain of an instruction which is in harmony with the one given at their request. [*Lange v. Mo. Pac. Ry. Co.*, 208 Mo. 458, 1. c. 475; *Ellis v. Met. St. Ry. Co.*, 234 Mo. 1. c. 676; *Kame v. Railroad*, 254 Mo. 1. c. 197; *Williams v. Gas. & Electric Co.*, 274 Mo. 1, 1. c. 14; *Lareau v. Lareau*, 208 S. W. 241, 1. c. 245, and cases cited; *Bettoki v. Northwestern Coal & Mining Co.*, 180 S. W. 1. c. 1023.] The foregoing assignment is accordingly overruled.

IV. Appellants' fourth and last assignment of error, reads as follows:

"The court erred in refusing to set aside the verdict of the jury on the ground that the same was grossly **Excessive** excessive and unwarranted by the evidence and **Damages.** physical facts."

In view of the above contention, we have carefully read the record, and have made a very full statement of the facts in the case. We find nothing in the record to indicate either passion or prejudice upon the part of the jury. The testimony of the witnesses, in respect to the

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value of plaintiffs' property and the damages sustained, on account of the change of grade and construction of said viaduct, is exceedingly contradictory, and presents a case where it was the peculiar province of the jury, to ascertain the damages sustained.

V. Finding no error in the record of which defendants can legally complain, we affirm the judgment. *White and Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

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EUGENE BENDER, and WALTER BENDER and JOSEPH BENDER, Jr., by Their Next Friend, EUGENE BENDER, Appellants, v. ESTELLE BENDER.

Division Two, March 13, 1920.

1. **RESULTING TRUST: Whence and How It Arises.** A trust results in favor of a party who furnishes the purchase money for real estate, when the title is taken in the name of another. It arises from the facts, not from an agreement, but regardless of and sometimes in spite of an agreement.
2. ———: **Presumption: Conveyance to Wife.** The presumption is that the grantee in a deed conveying real estate intends to hold the title in trust for the person who paid the purchase money. But that presumption is overcome by another where the husband pays the purchase price and his wife is named as the grantee, for then the presumption is that he intended the conveyance prima-facie as a provision for her. But the presumption that he intended the conveyance to operate as a settlement on his wife is rebuttable, but only under circumstances consistent with legal principles.
3. ———: **Coincident With Conveyance: Future Contingency: Express Trust.** A resulting trust must arise, if at all, at the instant the deed is taken. The transaction must be such that the trust arises the moment the title passes. If the trust in favor of the husband's children is made contingent upon the happening of an event in the future, such as the legal separation or divorce of the husband and wife, the children do not have a resulting trust in real estate paid for by the husband and conveyed to him and his wife.

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4. ———: **Parol Agreement to Hold in Trust: Express Trust.** Allegations that the husband's money paid for the real estate and that it was conveyed to him and her upon an agreement that in case of their legal separation or divorce, she and he would convey to their three children, is grounded on an express trust, which cannot be established by parol.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones*, Judge.

**AFFIRMED.**

*Jesse A. McDonald, Taylor R. Young and T. T. Hinde* for appellants.

(1) "Resulting trusts are those which arise from the acts of the parties by operation of law. The party to be charged as trustee may never have agreed to the trust and may have really intended to resist it, yet if his acts have been such as are in honesty and fair dealing consistent only with a purpose to hold the property in trust, a trust will result by operation of law." *Stevens v. Fitzpatrick*, 218 Mo. 723; *Ferguson v. Robinson*, 258 Mo. 129; 39 Cyc. 118. (2) Neither the Statutes of Frauds nor any provision of our statutes precludes parol proof of a resulting trust. *Stevens v. Fitzpatrick*, 218 Mo. 708; *Ferguson v. Robinson*, 258 Mo. 113. (3) The existence of an express agreement does not destroy a resulting trust. *Shelton v. Harrison*, 182 Mo. App. 416; *Smithsonian Institution v. Meech*, 169 U. S. 409. (4) While there is a presumption of an advancement or gift when the husband purchases with his own funds and deeds to his wife, yet this is a mere presumption of fact and not of law, and may be shown by parol to be a resulting trust. *Price v. Kane*, 112 Mo. 415; *Viers v. Viers*, 175 Mo. 453; *Siebold v. Christman*, 7 Mo. App. 256; *Smithsonian Institution v. Meech*, 169 U. S. 410.

*Glendy B. Arnold* for respondent.

(1) The court did not err in holding that the plaintiffs' petition counted on an express trust. Sec. 2868, R.

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S. 1909; Hillman v. Allen, 145 Mo. 638. (2) The court did not err in excluding the evidence offered by appellants to establish a resulting trust. Hillman v. Allen, 145 Mo. 638; Sec. 2868, R. S. 1909.

WHITE, C.—The appeal is from a judgment of the Circuit Court of St. Louis, dismissing plaintiffs' bill whereby they sought to establish a resulting trust.

The defendant, Estelle Bender, was the mother of the plaintiffs, and Joseph Bender, Sr., was their father. At the time of the trial, plaintiff Eugene Bender was twenty-two years of age, Walter Bender was twenty, and Joseph Bender, Jr., seventeen. In 1901 and thereafter Joseph Bender, Sr., purchased three pieces of real estate in the City of St. Louis described in the petition, and caused conveyance to be made to himself and his wife, Estelle Bender. In 1912, Estelle Bender, the defendant, instituted a suit for divorce against Joseph Bender, Sr., and in 1914 a decree was rendered divorcing them from the bonds of matrimony. At the time of the trial, the three children were living with their father, Joseph Bender, Sr.

The petition sets out that Joseph Bender, Sr., and defendant Estelle Bender, were the apparent owners in fee simple of the property, describing it, and then alleges:

“Plaintiffs further state that at the time of acquiring the foregoing described real estate the same was acquired and purchased by the said Joseph Bender, Sr., with his own funds, but he took the title to the same out in the name of himself and the name of Estelle Bender with the distinct understanding and agreement with the said Estelle Bender that in the event there should be any future separation between the said Joseph Bender and Estelle Bender, said father and mother of these plaintiffs, then and in that event the title and interest of the defendant and Joseph Bender in and to all of said real estate should be conveyed to these plaintiffs and that they should thereafter be owners thereof

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and free from any interest whatever of the said Joseph Bender, Sr., and the defendant, Estelle Bender."

The petition then alleges that decree of divorce was rendered between Estelle Bender and Joseph Bender, Sr., by reason whereof the plaintiffs were entitled to have the property described conveyed to them; that Joseph Bender was ready to convey, but Estelle Bender refused to convey. The prayer is that the title of Estelle Bender be divested and vested in the plaintiffs. The answer is a general denial.

On the trial Joseph Bender, Sr., was sworn; he testified to the relationship of the parties, the acquisition of the property, and that he had paid the purchase money out of his own funds. The plaintiffs then offered to show the agreement set up in the petition, the essential part of which offer was as follows:

"That at the earnest solicitation of his wife Estelle Bender, the defendant here, he (Joseph Bender) consented and agreed to take the title in the joint name of himself, Joseph Bender, and Estelle, his wife, on condition that in the event that there should ever be any controversy between them, or should there ever be a separation or a divorce between them, then and in that event that that property should be, by Estelle Bender and himself, Joseph Bender, conveyed to the three children of Joseph Bender and Estelle Bender, who are the plaintiffs in this case; that the said Estelle Bender promised and agreed that if he would purchase this property and take the title in the name of himself and her, as his wife, she would do that."

This evidence was excluded by the court; plaintiffs duly excepted. Thereupon the bill was dismissed.

I. It is claimed by appellant that a trust resulted in their favor by the purchase of the property under the **Resulting Trust.** circumstances alleged in the petition, of which they offered proof as stated.

A trust results in favor of a party who furnishes the purchase money for real estate, when the title is taken in the name of another. In this case, if Joseph

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Bender, Sr., and Estelle Bender had been strangers to each other and it were shown that he had paid the purchase money and taken the title in the names of the two, nothing further appearing, a trust would result in his favor for the half interest held in the name of Estelle. It might be, if there were anything in the transaction to show he intended it as a gift to his children, that a trust would result in their favor, although it is unnecessary to determine that proposition here.

A resulting trust arises from the facts, not from any agreement, but regardless of and sometimes in spite of an agreement. It is presumed that the holder of the title intends to hold it in trust for the person who paid the purchase money. In this case, however, owing to the relationship of the parties, that presumption is overcome by another presumption. When a husband purchases real property with his own funds and causes same to be conveyed to his wife, prima-facie it is presumed that he intended the conveyance as a provision for his wife, and a trust will not result. [Viers v. Viers, 175 Mo. l. c. 453; Curd v. Brown, 148 Mo. l. c. 92.] And where the title in such case is taken in the name of both husband and wife an estate by the entirety occurs. [Moss v. Ardrey, 260 Mo. l. c. 604.] The presumption that the purchase was an intended settlement on his wife is rebuttable and it becomes necessary to inquire under what circumstances the presumption may be rebutted.

II. A resulting trust must arise, if at all, at the instant the deed is taken. Unless the transaction is such that the moment the title passes the trust results from the transaction itself, then no trust results. It cannot be created by subsequent occurrences. 1 Perry on Trusts, sec. 133; Barrett v. Foote, 187 S. W. 69; Stevenson v. Haynes, 220 Mo. 206; Kelly v. Johnson, 28 Mo. 249; Richardson v. Champion, 143 Mo. 544.

According to the facts in this case which the plaintiffs seek to establish, no trust resulted at the time the

Coincident  
With Deed.



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conveyance was made, but it was contingent upon the happening of an event in the future,—the separation of their parents.

**Express Trust.**

A trust results by operation of law from the facts in the transaction and never by operation of any agreement; from what the parties *do*—not from what they agree to do. If a parol agreement providing for a conveyance is resorted to, it at once becomes an express trust and not a resulting trust, and cannot be established by parol. [Sec. 2868, R. S. 1909; Thomson v. Thomson, 211 S. W. 52, l. c. 56; Heil v. Heil, 184 Mo. 665, l. c. 676; Price v. Kane, 112 Mo., l. c. 419; 1 Perry on Trusts, sec. 134.]

The only acts shown here were the payment by Joseph Bender, Sr., of the purchase money and the conveyance of the property to himself and wife. No further act or fact is presented which would rebut the ordinary presumption that he intended it as a settlement upon his wife. What it is sought to prove is an express agreement on the part of himself and wife to convey the property upon the happening of the contingency, the separation of the two. Under the authorities last cited this could not be shown by parol testimony. It was an attempt to establish an express trust and not a resulting trust.

The judgment is affirmed. *Railey and Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

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R. H. O'BANNON v. A. A. WYDICK et al., Appellants.

Division Two, March 13, 1920.

**PROFESSIONAL SERVICES: Mechano-Therapist: No License.** A mechano-therapist, having no license to practice, cannot recover for his services as "a practitioner of drugless healing" and of

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"the chiropractic method." [Approving and adopting opinion of Springfield Court of Appeals in *O'Bannon v. Wydick*, 197 S. W. Rep., 432.]

Appeal from Howell Circuit Court.—*Hon. E. P. Dorris*, Judge.

REVERSED.

*J. C. Dyott* for appellants.

(1) The verdict should have been for the defendant rather than the plaintiff. His petition alleges that the defendants are indebted for "medical services," while the evidence shows that he is not a physician as specified by the statute, nor never has been, and is therefore suing for a debt contracted under false pretense, and in the practice of medicine against the positive mandate of the statute. Secs. 8311 and 8313, R. S. 1909; *State v. Smith*, 233 Mo. 242. (2) Plaintiff's petition does not state a cause of action. If the plaintiff had not the legal capacity to sue and had no standing in court, his complaint being based upon the charge for professional medical service, and he failed to allege and prove that he was licensed by the State for that purpose, he did not state a cause of action. *Swift v. Kelley*, 133 S. W. (Ark.) 901. (3) The plaintiff has not the legal capacity to sue and recover. The practice of mechano-therapy or any other forms of medicine by any person who has failed to comply with the authorizing statutes for any unlawful practice and any contract based upon such services rendered, has for its object void consideration. *Chitty on Contracts*, 230; *Rothwell v. Gibson*, 121 Mo. App. 234; *Bishop on Contracts* (Ed. 1887), sec. 471, citing *Friend v. Porter*, 50 Mo. App. 89, 9 Cyc. 475; *Down v. Ringer*, 7 Mo. 585. "The cases in this country are uniform in holding that a contract forbidden by statute is void." *Live Stock Assn. v. L. & C. Co.*, 138 Mo. 394; *Tri-State Amusement Co. v. Amusement Co.*, 192 Mo. 404. (4) An expressed or implied contract of the nature as herein indicated should not be upheld on the ground of the

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public policy. *Orr v. Meek*, 111 Ind. 40; *Thompson v. Hazen*, 25 Me. 104; *Bailey v. Mogg*; 4 Den. (N. Y.) 60; *Alcott v. Barber*, 1 Wend (N. Y.) 526; *Puckett v. Alexander*, 102 N. C. 95, 3 L. R. A. 43.

*L. P. Main* and *O. F. Wayland* for respondents.

(1) Does the statement set forth a cause of action? It does in any view of the case for this court cannot take judicial notice that mechano-therapy is a school of medicine, and even if it is, and the court could take judicial notice of that fact it is held in *Des Mond v. Kelly*, 163 Mo. App. 205, that it is not necessary in an action for medical services to allege the possession of a license but that the want thereof, if a defense at all, must be affirmatively pleaded. In that case the court specifically declined to pass upon the question as to whether the defense would be good. (2) The real question at issue in this case is the right of a person treating any kind of bodily disorder to recover for his services in the absence of a license to practice medicine. In discussing this question we will admit for the sake of the argument that mechano-therapy is a school of medicine within the meaning of the statute, but we insist that in this State the possession of a license is not a condition precedent to the recovery of pay for services. *Smvthe v. Hanson*, 61 Mo. App. 285. (3) It will be observed that regardless of the history of the act the court in the *Smvthe* case say that in this State unless the contract itself prohibited, recovery can be had for services rendered under it. The latest application of this rule is the case of *McConnon v. Haskins*, 180 S. W. 21. Counsel for appellant says in his brief that this case is not applicable because the Peddler Act is a revenue act, but in the case of *State v. Webber*, 214 Mo. 272, the Supreme Court held that it was an exercise of the police power and for that reason constitutional.

RAILEY, C.—On April 17, 1916, plaintiff filed before R. F. Holloway, a justice of the peace, at Willow

Springs, Howell County, Missouri, a suit against above defendants. The petition, without caption and signature, reads as follows:

"The plaintiff states that the defendants are husband and wife and are indebted to him in the sum of \$109.35 for professional services as a mechano-therapist rendered by him to defendants and their family at their request."

A jury found the issues for defendants in the court of the justice of the peace, and judgment was entered accordingly. The case was appealed by plaintiff to the Circuit Court of Howell County. Defendants filed, in the latter, a general denial. The case was tried before the court without a jury, and judgment rendered in favor of plaintiff for \$104.50 and costs. Defendants, in due time, filed their motion for a new trial, which was overruled and the cause duly appealed by them to the Springfield Court of Appeals.

The evidence is sufficient to warrant a finding in favor of plaintiff, if he was authorized by law to perform the services rendered and charge for same.

Plaintiff admitted at the trial that his demand was for services rendered in the treatment of ailments and diseases of the human body; that he had no license as a physician or surgeon which authorized him to render the services sued for. He testified as follows:

"Q. What profession or line are you following?  
A. Well, sir, I am covering the field as a practitioner of drugless healing and take the general field of diatetics, scientific food, the adjustment of the spine and a correspondence course in osteopathy in Cincinnati, two years in the practice and study of medicine 28 years ago. It is what is called mechano-therapy.

"Q. You have also stated you are practicing what is known as the chiropractic method? A. Yes, except the medicine: I use food and scientific work."

The Springfield Court of Appeals, in an able and exhaustive opinion by Judge FARRINGTON, concurred in by all the judges of that court, held that plaintiff, without

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a license to practice, could not recover, under the circumstances aforesaid, and reversed the case. The cause was transferred here on account of the conflict between the above opinion and that in *Smythe v. Hanson*, 61 Mo. App. 285, decided by the St. Louis Court of Appeals. Upon a careful consideration of the questions presented, we are of the opinion that the decision of the Springfield Court of Appeals, which is reported in full in 198 S. W. 432 and following, properly declares the law of the case, and is hereby adopted as the opinion of this court.

In 8 Elliott on Contracts (1913-1918 Supplement), pages 126 et seq., sections 646 and following, Judge FARRINGTON's opinion *supra*, is strongly approved, and a number of recent decisions from other jurisdictions are cited in support of same.

The judgment of the circuit court is accordingly reversed. *White and Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

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MINNIE E. NORTON et al.; JOHN R. JOHNSON, Intervener, Appellant, v. ISAAC F. REED et al.; IDA HARLICK et al., Interveners.

Division Two, March 13, 1920.

1. **ASSIGNMENT:** Cause of Action: Stipulation as to Settlement: Substitution. An action in ejectment pending in the proper court, with a stipulation on file between all the parties agreeing to a final disposition of the case, is assignable, and a conveyance by quit-claim deed, executed by plaintiffs, in which they convey to a named grantee all their right, title and interest in the land and to the damages for rents and profits, is such an assignment, and entitles the grantee to be substituted as plaintiff, unless the cause of action had already been lost for some other reason.

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2. ———: **Dismissal.** Where a cause of action is pending on a stipulation for judgment and is assigned by the plaintiffs, together with all their interests in the property in suit, the court should not permit plaintiffs, upon the payment of costs, to dismiss the action, without the consent of the assignee.
3. ———: ———: **Reinstatement: Writ Coram Nobis.** After the adjournment of the term, a case wrongfully dismissed cannot be reinstated by motion under Secs. 2119-2121, R. S. 1909, if there is nothing on the face of the record indicating that error had been committed. But if the motion is in the nature of a writ of error *coram nobis*, and points out a mistake made by the court, without the fault of movement, based upon a misapprehension of the actual facts, which, if known to the court at the time, would have precluded a dismissal, the cause may be reinstated in response thereto; for the purpose of a writ of error *coram nobis* is to enable the court to correct some error of fact, which did not appear in the record and which was unknown to the court when the order was made.
4. ———: **Unsigned and Amended Petition: Conveyance by Defendant: Stipulation for Judgment.** The filing of an unsigned petition is the commencement of a suit, and the filing of an amended petition at the return term relates back to the filing of the original petition; and a suit in ejectment is properly brought against the owner and his tenant in possession; and if, after such amended petition is filed, the attorneys who sign it and the attorneys for defendants enter into and file in the case a stipulation for judgment in accordance with a final adjudication in another pending cause resting upon the validity of the same administrator's deed, such stipulation is binding on all the parties and their assignees, although one day before the suit was brought the defendant, by a deed not recorded until one day thereafter, had conveyed to intervener; and intervener is in no better position than he would be had the original petition been properly signed.
5. ———: **Ejectment Against Grantor: Stipulation for Judgment.** The purchaser from the defendant in ejectment, by deed executed one day before suit is filed but not recorded until one day after, is, under the statute (Sec. 1732, R. S. 1909), entitled to be joined as codefendant and to defend his title, or to have it defended in the name of the original defendants. And if a stipulation is signed by the attorney for the original defendants that the action shall remain on the docket and abide the result in another pending suit, he and his grantee are bound by the stipulation.

Appeal from Butler Circuit Court.—*Hon. J. P. Foard,*  
Judge.

REVERSED AND REMANDED (*with directions*).

*Arthur T. Brewster, Buford & Chitwood, and J. B. Daniel* for appellant.

(1) The suit having been brought against the person in actual possession it is immaterial that the grantor of interveners who claimed title to the land through an unrecorded deed was not made a party thereto. R. S. 1909, sec. 2385. (2) It being admitted by the pleadings that at the date of the order of dismissal the plaintiffs had parted with all their interest in the subject-matter of the suit and that said interest had passed by conveyance to the intervener at the date of the filing of the motion herein by him, the motion should have been sustained. (3) A motion in the nature of a writ of error *coram nobis* is the correct procedure to correct an error in a judgment, after the lapse of a term at which the judgment is rendered where the error is not patent on the record, but must be shown by evidence *dehors* the record. State ex rel. v. Riley, 219 Mo. 667; Hadley v. Bernero, 103 Mo. App. 549; Cross v. Gould, 131 Mo. App. 585; State v. Stanley, 225 Mo. 525; 5 Ency. Pleading & Practice, 27. (4) One not a party to an action, i. e. a stranger to the record, may file a motion in the nature of a writ of error *coram nobis*, if he is privy to the record or injured thereby. State ex rel. v. Riley, 219 Mo. 684; 5 Ency. Pleading & Practice, 31; Dugan v. Scott, 37 Mo. App. 663; State ex rel. v. Heinrich, 14 Mo. App. 146. (5) Even if it were shown beyond question that the original petition was not signed by counsel, such error was waived by answering over to an amended petition and could not be successfully raised thereafter. Brookshier v. Mutual Fire Ins. Co., 91 Mo. App. 599. (6) Error in failing to sign a pleading, if objected to in due time, can be cured by amendment when attacked. Reamer v. Morrison Express Co., 93 Mo. App. 510.

*R. I. January and J. H. Keith* for respondents.

(1) All actions must be prosecuted in the name of the real party in interest, and to recover possession of real estate must be brought against the person in possession of the premises. Secs. 1729, 2585, R. S. 1909. (2) All pleadings shall be signed by the pleader or his attorney. R. S. 1909, sec. 1822; *Orley Stain Co. v. Whitson*, 34 Mo. App. 624. (3) To entitle plaintiff in ejectment to judgment, it is necessary to show that defendant in the suit, at the date of the commencement or filing of the suit, was in the possession of the premises. Sec. 2389, R. S. 1909; *Haden v. Goodwin*, 217 Mo. 662; *Philips v. Philips*, 187 Mo. 360. (4) A voluntary nonsuit will not be reviewed. *Koger et al. v. Hays, Admr.*, 57 Mo. 329; *Greene County Bank v. Gray*, 146 Mo. 568; Sec. 1980, R. S. 1909. (5) Nonsuit abandons original suit. *Karnes v. American Fire Ins. Co.*, 53 Mo. App., 440; *Wiethaup v. City of St. Louis*, 158 Mo. 655. (6) Stipulation could not affect rights of those not party. *Barber Asphalt Paving Co. v. Young*, 94 Mo. App. 214. (7) A judgment dismissing a cause cannot be set aside on motion after the end of the term at which it was rendered. *Jameson v. Kinsey*, 85 Mo. App. 301; *State ex rel. Ozark County v. Tate*, 109 Mo. 265; *Peak v. Redd*, 14 Mo. 79.

RAILEY, C.—On October 23, 1907, Minnie A. Norton, Catherine Dougherty, John C. Vandyke and James T. Vandyke, as plaintiffs, filed, in the Circuit Court of Reynolds County, Missouri, a petition in ejectment, against Isaac F. Reed and Martin Burnham, as defendants, to recover possession of an undivided four-fifths of the following described real estate located in said county, to-wit:

“All of the west half of the east half of Lot 2 of the northwest quarter of Section 5 in Township 29 of Range 1 east, except a strip one hundred and five feet wide off of the south end thereof.”

Five suits in ejectment were filed by the same plaintiffs, on the same day, in the same court, against



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separate and distinct defendants. The title of the several defendants to the several tracts of land involved in said several suits depended, in each case, upon the sufficiency of a certain administrator's deed, purporting to convey all of the land involved in said five suits, to a common grantor of all the defendants in said five actions. In the present action, the defendants were served with process on October 23, 1907, and thereafter answered in said cause. It is admitted by counsel in the present controversy, that Benjamin C. Vandyke, the father of plaintiffs, was the common source of title.

Benjamin C. Vandyke died in said county, on July 14, 1884, intestate, and left, as his only heirs at law, the above named plaintiffs and the minor children of his deceased daughter, Bertie E. Cooper, namely, Bessie Cooper, Morey Cooper, Carter Cooper, Charles Taylor and Clarence Taylor. The plaintiffs herein claimed to be the owners of the undivided four-fifths of said real estate, as tenants in common with the children of said Bertie E. Cooper, deceased, who claim to have owned an undivided one-fifth of same.

The date of ouster is named as August 4, 1901.

On December 5, 1907, during the November Term, 1907, of the Reynolds Circuit Court, and after the above named defendants herein had been served with process and answered in said cause, a stipulation was filed therein, by the respective parties thereto, which without caption and signatures, reads as follows:

"It is stipulated and agreed by and between the parties, plaintiffs and defendants, in the above entitled cause, that this cause shall stand continued in this court until a final judgment is entered, either in this or in the Supreme Court, in the ejectment case of the same plaintiffs against Joseph A. Reed, tried in this court and involving the same title.

"Upon the entry of a final judgment in said case of Minnie A. Norton et al. against Joseph A. Reed, either in this court or in the Supreme Court, then either party to this suit may move for judgment in this court, in this case, and shall be entitled to a judgment

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for either the plaintiffs or the defendants, as may have been determined in said suit against Joseph A. Reed, but in case the judgment so entered is for plaintiff for possession the parties may give evidence as to the rents and profits in this case, but all other issues shall be determined by such final judgment in said case against Joseph A. Reed."

Said stipulation was signed by attorneys, J. B. Daniel, John H. Raney and R. L. McLaran, in behalf of said plaintiffs, and by S. L. Clark and R. I. January, as attorneys for defendants herein.

After one of said five suits had been tried in the Circuit Court of Reynolds County, to-wit, that of Minnie A. Norton et al. v. Joseph A. Reed, the stipulation aforesaid was filed herein. The above named case against Joseph A. Reed was decided by the circuit court, in favor of plaintiffs, and defendants duly appealed said cause to the supreme Court of Missouri, where it will be found reported in 253 Mo. 236-7 (161 S. W. 842). The supreme Court, on December 6, 1913, affirmed the judgment of the Reynolds Circuit Court in the above cause.

Thereafter, before the next term of the Reynolds Circuit Court, plaintiffs in the present suit sold all their interest in the subject-matter of this action, to said defendant, Joseph A. Reed, who thereafter executed a deed, conveying to the intervener herein, John R. Johnson, all of the land involved in this suit. Said deed from Joseph A. Reed to said John R. Johnson was duly recorded in Reynolds County, on September 5, 1914. By the terms of said sale between plaintiffs and said Joseph A. Reed, it was agreed that said Reed should, and he did, pay all the costs in this suit. Thereafter, on November 25, 1914, an order was entered of record in this cause in the Circuit Court of Reynolds County, reciting, after the caption, the following: "Dismissed by plaintiffs, all costs having been paid."

Thereafter, on November 29, 1916, John R. Johnson, as intervener herein, filed in this cause, a motion in the nature of a writ of error *coram nobis*, setting

out the facts aforesaid, and praying to be substituted as plaintiff herein, instead of the plaintiffs, who had, after suit filed, and before judgment rendered, parted with their interest in the subject-matter of this suit, averring, that said order of dismissal was erroneously made and praying that the same be set aside, and judgment rendered herein upon the stipulation aforesaid. Said Johnson, for convenience, will hereafter be designated as *appellant*.

At the time of the institution of this suit, the defendant, Isaac F. Reed, appeared by the records of Reynolds County, Missouri, to be the record owner of the lands in controversy, if said administrator's deed passed any title thereto, and the said defendant, with Martin Burnham, were in the actual possession thereof.

As above indicated, this suit was filed October 23, 1907. A like suit involving the same subject-matter for the same plaintiffs, and against the same defendants, had theretofore been filed, plaintiffs had suffered a nonsuit, and thereafter, within one year after said nonsuit, filed the present action. The defendant, Isaac F. Reed, on October 22, 1907, one day before the filing of this suit, had executed a deed to one J. C. Webb, purporting to convey to him the lands in dispute, but the deed was not filed for record until the day after the filing of this suit. Thereafter, the said J. C. Webb, executed a deed purporting to convey these lands to his then wife, now Ida M. Herlick, who thereafter executed a mortgage purporting to convey said lands to F. Louis Zimmerman, to secure a note for \$600. After the filing of said motion by appellant, John R. Johnson, the said Ida M. Herlick and F. Louis Zimmerman, were, by the Reynolds Circuit Court, permitted to intervene, as parties defendant, in lieu of their remote grantor, Isaac Reed, and filed objections to the setting aside of said nonsuit. The last named interveners will be designated hereafter as respondents.

The venue was changed and the above cause, between appellant and respondents, was sent to the Circuit Court of Butler County, Missouri, where it was

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heard on the 27th day of April, 1917, and judgment rendered, denying to said John R. Johnson the right to be substituted as a plaintiff herein.

Appellant, in due time, filed his motion for a new trial, which was overruled and the cause duly appealed by him to the Springfield Court of Appeals. The latter court, on account of title to real estate being involved, transferred the cause to this court.

I. The case of Minnie A. Norton et al. v. Isaac F. Reed et al. was pending in the Circuit Court of Reynolds County, Missouri, on November 25, 1914, with the stipulation aforesaid on file therein, between all the parties to said action, as to the final disposition of this cause. Prior to the above date, said plaintiffs, on May 27, 1914, by quit-claim deed, conveyed to Joseph A. Reed all their right, title and interest in the land in question, and to any damages for rents and profits thereon. On December 27, 1913, plaintiff, James T. Vandyke, conveyed, by quit-claim deed, to said Joseph A. Reed, all his interest in the lands aforesaid, and in the damages due him for rents and profits thereon. On September 7, 1914, Joseph A. Reed conveyed by deed to appellant, John R. Johnson, all his right, title and interest in the lands aforesaid, which last described deed was duly recorded in Reynolds County on said September 7, 1914. It is contended by respondents, in their brief, that the conveyances, supra, did not convey to said Johnson the right to be substituted as plaintiff in this action and to enforce the provisions of said stipulation. In other words, it is asserted in respondents' brief, page 8, that:

"Some causes of action may be assigned, but our statute, Section 1729, Revised Statutes 1909, prohibits an assignment of a thing in action not arising out of contract."

This contention is without merit. [Wiehtuechter v. Miller, 208 S. W. 1. c. 41; McGinnis v. McGinnis, 274 Mo. 1. c. 296-7, 202 S. W. 1. c. 1090; Remmers v. Remmers, 217 Mo. 1. c. 561; Choteau v. Boughton, 100 Mo. 1. c.

410; Snyder v. Railroad Co., 86 Mo. 613; Coffman v. Railroad, 183 Mo. App. 622; Brown v. Railroad Co., 198 Mo. App. 1. c. 76, 199 S. W. 708.] The rights of appellant, Johnson, must, therefore, be determined on the theory that he was entitled to be substituted as plaintiff in this case, in lieu of the original plaintiffs, whose interests in said land he had acquired by the conveyances aforesaid, unless he has lost such right by virtue of the nonsuit relied on by respondents.

II. This brings us to the question as to whether or not the Circuit Court of Reynolds County was justified in entering of record in this case, on November 25, 1914, the following entry:

**Dismissal.** "Dismissed by plaintiffs, all costs having been paid."

The costs were not paid at the date of said dismissal, but were previously paid by Joseph A. Reed, when he acquired the interests of plaintiffs, and under an agreement made with them. Appellant, John R. Johnson, testified as follows:

"On November 25, 1914, I was not represented by any attorney in this case. I was not consulted and did not consent to, or participate in, the order of dismissal made herein. I did not dismiss it, authorize any one to dismiss it, or have anything to do with the dismissal of it. I bought the land before said order of dismissal."

On cross-examination, he further testified:

"I was admitted to the bar, in December, 1912. C. M. Buford did not represent me in the purchase of this land. I examined the stipulation pleaded herein before I bought the land. I was not a party to this suit at that time."

At the date of said dismissal, both the plaintiffs and Joseph A. Reed, had parted with their interests in said land, the same having passed to appellant, Johnson, by virtue of the conveyances aforesaid. We find from the evidence that no one present, at the time of said dismissal, was authorized to represent J. R. Johnson. We are

satisfied from the record that the trial court was *misled* by the remarks of some one present, when the dismissal was entered, who the court thought at the time was authorized to speak for the plaintiffs in said cause, but who, as a matter of fact, had no such authority. We think it manifest from the testimony that had the trial judge known at the time of said dismissal that John R. Johnson was then the owner of plaintiffs' interest in said land, and that he was not represented by any one present, he would not have entered the order of dismissal, and thereby deprived Johnson of the rights given him by his purchase, under the stipulation aforesaid.

The question still arises, as to whether Johnson, by virtue of his motion, as intervener in this cause, is entitled to have the record entry aforesaid cancelled, and an order made substituting him as plaintiff, in lieu of the original plaintiffs.

III. Is appellant entitled to the relief asked for in his motion? The latter could not be successfully sustained under Sections 2119, 2120 and 2121, Revised Statutes 1909, because there is nothing on the face of the circuit court record which indicates that any error had been committed. [Jeude v. Sims, 258 Mo. l. c. 39, and cases cited.] The motion before us contains all the facts necessary to constitute it a writ of error *coram nobis*. It points out a mistake made by the court, without the fault of appellant, based upon misapprehension of the actual facts, which if known to the court at the time, would have precluded it from dismissing the cause.

In Jeude v. Sims, *supra*, at page 40, Judge WALKER, speaking for the Court in Banc, in respect to this subject, said:

"At common law writs of error *coram nobis* were writs granted by the court rendering the judgment for the purpose of correcting some error of fact. [2 Tidd's Practice, p. 1136.] The fact must be such a fact that, had it been known at the time of the rendition of the

judgment, such judgment would not have been entered. It must be a fact directly connected with the case in which the judgment was entered, and a fact wrongly considered in the entry of the judgment which is sought to be corrected by the writ of error *coram nobis*."

This writ is usually brought into requisition to correct some error of fact which did not appear in the record, and which was unknown to the court. The principles above announced are sustained by other authorities in this State, some of which are as follows: *State v. Stanley*, 225 Mo. l. c. 531 and following; *State ex rel. v. Riley*, 219 Mo. 667; *Karicofe v. Schwaner*, 196 Mo. App. l. c. 572, 196 S. W. 46; *Hadley v. Bernero*, 103 Mo. App. 549; *Dugan v. Scott*, 37 Mo. App. 663; 5 *Encyclopedia of Pl. & Practice*, 31. Appellant's motion, therefore, entitled him to a writ of error *coram nobis* on the facts before us.

IV. The trial court had before it, in passing upon appellant's motion, and respondents' objections thereto, all the parties claiming any interest in the lands involved in this litigation. John R. Johnson, by virtue of the conveyances aforesaid, had succeeded to the rights of plaintiffs in this cause, and the respondents were defending, by virtue of the deed from Isaac F. Reed to J. C. Webb, etc. R. I. January appeared as counsel for defendants, Isaac F. Reed and Martin Burnham, and signed the stipulation aforesaid, as their counsel. He was served with a copy of appellant's motion, and appeared for respondents in resisting same.

V. It is conceded that at the time of the institution of this suit, on October 23, 1907, the defendants were in the possession of the real estate in controversy, and that both were duly served with process in said cause, on the date last aforesaid. On October 22, 1907, defendant, Isaac F. Reed, executed and delivered to J. C. Webb a warranty deed, for the expressed consideration of \$1200, for the above land. This deed was not recorded until October 24, 1907. The

Interested  
Parties.

Instituting  
Suit.

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evidence tends to show that the original petition herein was not signed by either counsel or plaintiffs, but, during the November Term 1907, of the Reynolds Circuit Court, an amended petition was filed in said cause, duly signed by the same counsel, whose names were appended as attorneys for plaintiffs in the execution of said stipulation. Thereafter said defendants answered in said cause, and their attorneys of record, S. L. Clark and R. I. January, signed the stipulation aforesaid in behalf of said defendants. The suit was properly brought against said defendants, who were then in possession of said real estate. [Sec. 2385 R. S. 1909; Realty and Development Co. v. Norman, 259 Mo. l. c. 636; Mann v. Doerr, 222 Mo. p. 2, par. 5; Hunter v. Wethington, 205 Mo. 284, 103 S. W. 543; Houghton v. Pierce, 203 Mo. 723.] The filing of the petition on October 23, 1907, although *unsigned*, was the commencement of said suit. [Sec. 1756, R. S. 1909; Knisely v. Leathe, 256 Mo. l. c. 364-5; State ex rel. v. Wilson, 216 Mo. 292; McGrath v. Railroad Co., 128 Mo. 1; South Missouri Lumber Co. v. Wright, 114 Mo. 326; Koch v. Shepard, 193 S. W. l. c. 602; Matthews v. Stephenson, 172 Mo. App. l. c. 228-9.]

Conceding that the original petition was not signed, it was clearly an oversight, that might have been corrected at any time, either before or after final judgment. [Secs. 1848, 1850, 1851, 1852, R. S. 1909; Cochran v. Thomas, 131 Mo. l. c. 274-5; Rosenheim v. Hartsock, 90 Mo. l. c. 365; Reamer v. Morrison Ex. Co., 93 Mo. App. l. c. 510.] Plaintiffs filed an amended petition at the November Term, 1907, which was answered by defendants and the stipulation aforesaid duly filed. The filing of the amended petition, under the circumstances of this case, dates back by relation, to the filing of the original petition on October 23, 1907. [Land & Lumber Co. v. Franks, 156 Mo. l. c. 689, and cases cited; Lumber Co. v. Realty Co., 171 Mo. App. 629, and cases cited.]

We therefore hold, that respondents, as interveners in this case, are in no better position than they would have been had the original petition been duly signed.



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VI. The original suit was properly brought against Isaac F. Reed and Martin Burnham, as landlord and tenant under Sections 1732, 2385, 2386, Revised Statutes 1909. When J. C. Webb purchased the interest of Isaac F. Reed, on October 22, 1907, and failed to file his deed for record until October 24, 1907, he had the right, under Section 1732 *supra*, to be joined as a co-defendant, and defend his title, or to have it defended in the names of the original defendants.

It is conceded that S. L. Clark was attorney for defendants in this action, and signed the stipulation aforesaid as such attorney. We find upon examination of the record in *Minnie A. Norton et al. v. Joseph A. Reed*, 253 Mo. 237, that S. L. Clark appeared as counsel for Joseph A. Reed, in defense of the latter's title, in this court, after he had signed the stipulation aforesaid, providing that whatever judgment was finally rendered in the *Joseph A. Reed*, case, *supra*, should determine the rights of the parties in this litigation. In the above case, reported in 253 Mo. 252, the other Division held that the administrator's deed, under which Joseph A. Reed claimed title, was void, and the judgment below in favor of plaintiffs was affirmed. In this ejectment suit, the title of Isaac F. Reed depended upon the validity of the administrator's deed declared void by the other Division in the *Joseph A. Reed* case. Respondent, Ida M. Herlick, asserts title through her husband, J. C. Webb, who claimed to have acquired the title of Isaac F. Reed, which was dependent upon the void administrator's deed aforesaid.

We accordingly hold, that as against Ida M. Herlick, leaving out of consideration for the present the equities, if any, of F. Louis Zimmerman, appellant, John R. Johnson, was entitled, in the lower court, to have the order of the Reynolds Circuit Court, made in this cause on November 25, 1914, set aside and cancelled; and to be substituted as plaintiff in this cause, in lieu of the original plaintiffs. He is further entitled to a judgment, by the terms of the stipulation aforesaid, subject to such equities, if

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any, as said intervener, F. Louis Zimmerman, may be able to present, after appellant Johnson has been substituted as plaintiff herein.

We accordingly reverse and remand this cause with directions to the trial court to set aside and cancel said order of dismissal; to substitute appellant, John R. Johnson, as plaintiff, in lieu of the original plaintiffs; to determine the equities, if any, of intervener Zimmerman; and to dispose of the issues in the cause in conformity to the views herein expressed. *White and Mozley, C.C.*, concur.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

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GEORGE BEALMER and WILLIAM L. BEALMER,  
Partners, Doing Business as BEALMER & SONS,  
v. HARTFORD FIRE INSURANCE COMPANY  
OF HARTFORD, CONNECTICUT, Appellant.

Division Two, March 13, 1920.

1. **JURISDICTION: Not Contested by Either Party.** Notwithstanding neither party has questioned the jurisdiction of a court, the first question to be raised and decided by any court in any case is whether it has jurisdiction in point of fact.
2. ———: **Constitutional Question: Timely Raised.** If the only ground upon which the Supreme Court can have appellate jurisdiction of a case appealed to it is that the constitutionality of a certain statute is involved, the court must decide, although its jurisdiction is not questioned, whether such question was timely lodged in the case.
3. ———: ———: ———: **Wrong Section.** If the constitutionality of a certain section was not called in question in the trial court, that question, to be available as determining appellate jurisdiction, cannot be raised by assignment in the appellate court. If, by objections to the introduction of evidence and to the giving of certain instructions and by grounds stated in the motion for a new trial, appellant in the trial court challenged the consti-

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tutionality of Section 7047 of the Revised Statutes, it cannot on appeal shift those objections to Section 7052, and have the Supreme Court assume jurisdiction on the ground, first assigned in its brief, that said Section 7052 is unconstitutional for the reasons on which the validity of Section 7047 was challenged in the trial court.

4. ———: ———: **Construing Statute: Due Process.** A wrongful construction merely state that the section is not unconstitutional and omitted that such construction renders the statute unconstitutional, does not deprive appellant of its property without due process of law, or deny to it the equal protection of the laws, or introduce into the case a constitutional question in such wise as to confer appellate jurisdiction on the Supreme Court. A wrongful construction does not involve the validity of the statute, but the validity of the court's construction, and a wrongful construction amounts to no more than an erroneous judicial decision.
5. ———: ———: **Mere Assertion.** A mere assertion that a certain section is unconstitutional is not sufficient to confer appellate jurisdiction on the Supreme Court. It is not enough that the instruction merely state that the section is unconstitutional and void because in conflict with named sections of the Constitution, without any statement, either in the instruction or the brief, of the facts which create the conflict.

Appeal from Macon Circuit Court.—*Hon. Vernon L. Drain*, Judge.

TRANSFERRED TO KANSAS CITY COURT OF APPEALS.

*Barger & Hicks* and *Barker & Jones*, for appellant;  
*Bates, Hicks & Folonie*, of counsel.

(1) Sec. 7047, R. S. 1909, denies foreign insurance companies equal protection of the law. This section is violative of Section 1 of the Fourteenth Amendment to the Federal Constitution, and is unconstitutional and void. Said section conflicts with Sub-section 26, Section 53, Article 4, Constitution of Missouri, and with Article 2 of Section 30 of Constitution of Missouri. *Southern Railway Co. v. Greene*, 216 U. S. 400. (2) Defendant having been authorized to do business in Missouri was, after such authorization, entitled to be treated the same

as a domestic insurance company and entitled to equal protection of the law. The imposition of conditions preceding entry into the State have no bearing on the question, as the point goes to the equal rights of the defendant after being admitted. *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150. (3) To effectuate an assignment of a policy of fire insurance so as to create liability from the insuring company to the assignee, there must be (a) a valid assignment by the owner of the policy to the assignee and (b) the consent of the insurance company to the assignment. If the minds of the seller of the property and the purchaser have not met as to assigning the insurance or the expressed consent of the insurance company has not been secured, then in either event it is ineffectual. 2 *Joyce on Insurance* (2 Ed.), sec. 1120. (4) The court should have directed a verdict as a matter of law, because no valid assignment of the policy was proven, nor any consent of the insurance company requested or given respecting same. Unexecuted intention to assign a policy does not amount to an actual assignment. *Meadows' Guardian v. Meadows' Administrator*, 13 Ky. Law Report, 495. Fire insurance policies cannot be assigned without consent of the insurer. 4 *Joyce on Insurance* (2 Ed.), p. 2304. Assignment and consent thereto is a tripartite contract and must in every sense be a novation to have any legal effect. *Swaine v. Teutonia Fire Insurance Co.*, 222 Mass. 108. (5) Insurance agents, even though designated "general agents," are not substitutes for their employer with authority to do anything whatsoever but must act within the apparent scope of their authority. *Continental Insurance Company v. Schulman*, 205 S. W. 315.

*Dan R. Hughes and John R. Hughes* for respondents.

(1) The defendant's agent countersigned the policies and followed the usual course of business he had pursued for years with the consent of the company. This

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made their agent a general agent and his agreements and knowledge was binding upon the company. The company is estopped from disputing the authority of its agent. *Sheets v. Ins. Co.*, 153 Mo. App. 620; *Rogers v. Fire Ins. Co.*, 157 Mo. App. 671; *Deland & Sons v. Ins. Co.*, 68 Mo. App. 282; *Bealmer et al. v. Hartford Fire Ins. Co.*, 193 S. W. 847; *Woolfolk v. Home Ins. Co.*, 202 S. W. 627; *Prichard v. Conn. Fire Ins. Co.*, 203 S. W. 223. (2) The extent and character of the agent's authority is determined by the powers granted and the general course of dealing, and not the name by which the agent is designated by the company. *Sheets v. Ins. Co.*, 153 Mo. App. 620; *Nickell v. Ins. Co.*, 144 Mo. 420; *Bealmer v. Hartford Fire Ins. Co.*, 193 S. W. 847. (3) The general agent has authority to bind the company and his agreements or knowledge will be imputed to the company. A local agent having the power to make contracts of insurance has authority to make assignments of policies. *Nickell v. Ins. Co.*, 144 Mo. 420; *Sheets v. Ins. Co.*, 153 Mo. App. 620; *Bealmer v. Hartford Fire Ins. Co.*, 193 S. W. 847; *Woolfolk v. Home Ins. Co.*, 202 S. W. 627; *Prichard v. Conn. Fire Ins. Co.*, 203 S. W. 223. (4) When the agent knows the exact conditions and the premium is accepted or not returned, the company will be held liable for the loss. *Gray v. Ins. Co.*, 155 N. Y. 184; *Rogers v. Ins. Co.*, 157 Mo. App. 671; *Manning v. Ins. Co.*, 176 Mo. App. 678; *Rosecrans v. Ins. Co.*, 66 Mo. App. 352; *Bealmer v. Hartford Fire Ins. Co.*, 193 S. W. 847; *Woolfolk v. Home Ins. Co.*, 202 S. W. 627; *Prichard v. Conn. Fire Ins. Co.*, 203 S. W. 223. (5) Contracts of insurance need not be in writing. If the agent had authority his agreement for insurance or assignment of policies will bind the company. *R. S.* 1909, sec. 2993; *Baile v. Ins. Co.*, 73 Mo. 371; *Real Estate Saving Inst. v. Collonious*, 63 Mo. 290; *King v. Ins. Co.*, 195 Mo. 290; *State v. Lincoln Trust Co.*, 144 Mo. 592; 15 *Am. & Eng. Ency. Law* (2 Ed.), 852; 1 *Joyce on Insurance*, sec. 525; *Richards on Insurance*, sec. 41; *Vining v. Ins. Co.*, 89 Mo. App. 311; *Bealmer v. Hartford Fire Ins. Co.*, 193 S.

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W. 847; Woolfolk v. Home Ins. Co., 202 S. W. 627; Prichard v. Conn. Fire Ins. Co., 203 S. W. 223. (6) Sec. 7047, 1909, is constitutional. It is a general and not a special law. State v. Bishop, 128 Mo. 373; State ex inf. v. Aetna Ins. Co., 150 Mo. 113; Hamman v. Central Coal & Coke Co., 156 Mo. 232; Ex Parte Berger, 193 Mo. 16; Phillips v. Mo. Pac. Ry. Co., 86 Mo. 540.

WILLIAMSON, J.—This is a suit upon a fire insurance policy. The plaintiff recovered judgment below in the sum of \$1417.60. A motion for a new trial having proved unavailing, this appeal is taken. The essential facts are as follows:

Appellant insured the church building of the Baptist Church of Atlanta, Missouri, against fire, in the sum of fifteen hundred dollars. W. J. Dearing was the "surveying agent" for appellant in Atlanta, and as such countersigned all policies issued by it in that city, including the one here in question. Appellant was duly authorized to transact the business of insurance in this State, and Dearing was a duly licensed agent. Thereafter, the trustees of the church sold the building thus insured to plaintiffs, including in the sale the unexpired insurance, which was to be transferred to the purchasers. Later, and before the policy had expired by lapse of time, the building was totally destroyed by fire. The contract between plaintiffs and the trustees was never reduced to writing.

There was evidence that appellant's agent was informed, by plaintiffs, of their purchase of the building and unexpired insurance, and of the terms upon which it was made, very shortly after the purchase was made, and that he consented to the assignment of the insurance policy to plaintiffs and agreed to attend to the details necessary or usual in such cases, to vest the title to the policy in plaintiffs. The policy was at that time in the agent's possession. No written assignment of the policy to plaintiffs was ever made.

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W. J. Dearing, testifying in behalf of defendant, stated that he represented the defendant as its agent at Atlanta; that his duties as such agent were to solicit insurance, take the application and send it in to the company, whereupon, if approved, it would be returned to him and he would look it over, and if conditions remained the same, would then collect the premium, countersign the policy and deliver it to the assured; that he had solicited the insurance here involved, and had countersigned the policy here in question, after receiving the premium; that no part of the premium had ever been refunded to the insured, or to plaintiffs, nor had defendant ever offered to refund any part of it, and that shortly after the sale, and before the fire occurred, he was informed that the trustees had agreed to assign the insurance to plaintiffs. Dearing further testified that none of the trustees of the church said anything to him about assigning the policy, nor did any member of the building committee say anything to him about it, although the chairman of the board of trustees told him of the sale of the building to plaintiffs; that he was never requested by anybody to assign the policy of insurance nor to have it assigned; that though he had represented the company for twenty years, he had never assigned a policy of insurance.

The petition was sufficient in form. The answer admitted the issuance and delivery of the insurance policy, and the sale of the building, but denied the assignment of the policy, and denied that the defendant or its said agent had ever consented to the assignment. The reply was a general denial.

The assignments of error are that the court erred in refusing to direct a verdict for defendant as a matter of law; that instructions numbered one, two and four, given in behalf of plaintiffs, are erroneous; that instructions numbered one and two, requested by defendant, were improperly refused; that the court erred in admitting incompetent evidence; that "the court by rulings upon evidence and instructions, did so construe Section

7047, Revised Statutes 1909, as to deny defendant equal protection of the law, and said section so construed violates the constitutional rights and guarantees of the defendant," and that the court erred in overruling the motion for a new trial, on the ground, among others, of the alleged unconstitutionality of Section 7047, *supra*. No question was made in the trial court as to the constitutionality of any other section of the statutes.

The plaintiffs below contended that the consent by defendant's agent, Dearing, to the transfer of the insurance policy, and his knowledge of the sale and its conditions, bound the defendant company as effectively as if the policy had in fact been assigned. The trial court, in effect, so instructed the jury. Defendant's instruction number two, which the court refused to give, was a declaration that Section 7047, *supra*, was unconstitutional and void because in conflict with the constitutional provisions hereinafter named. In the view we take of this matter, no further statement of the facts is necessary.

This appeal comes to this court because of the constitutional question alleged to be involved.

It is obvious from the foregoing statement of facts that if we have jurisdiction of this case it is because, and solely because, a constitutional question is thought to be involved. Neither party has questioned our jurisdiction, but the first question to be decided by any court in any case is whether or not it has jurisdiction in point of fact. It is as essential to the orderly administration of justice that we should decline to proceed in any case where jurisdiction is absent, as that we should unhesitatingly adjudicate when jurisdiction appears. We are thus confronted with the vital question: Is a constitutional question involved in this cause? No constitutional question was made by the pleadings. The first suggestion of a constitutional question appears in an objection to the introduction of certain evidence, and the objection then made, in plain terms, is that Section 7047, of the Revised Statutes of Missouri of 1909, is unconstitutional and void under Subsection 26, Section



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53, Article 4, of the Constitution of Missouri, and under Section 1 of Article 14 of the amendments to the Federal Constitution, and also under Article 2 of Section 30 of the Constitution of Missouri.

Sub-section 26 of Section 53 of Article 4 of the Constitution of Missouri, forbids the passage of any law "granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track." We assume that by reference to Article 2 of Section 30 of our Constitution, Section 30 of Article 2 is meant. That section and Section One of the Fourteenth Amendment to the Constitution of the United States, are the familiar sections of those constitutions relating to "due process of law."

Similar objections are made to the introduction of other evidence from time to time "on constitutional grounds for the reasons heretofore stated." Upon the conclusion of the evidence appellant asked an instruction to the effect that that section, to-wit, Section 7047, *supra*, was void because in conflict with the various constitutional provisions above named. This instruction was refused and an exception was duly saved. Appellant also objected to each instruction given in behalf of respondents on the ground that each was "contrary to Section One of Article Fourteen of the Amendments of the Constitution of the United States, and unconstitutional and void under the terms and conditions" of the various provisions above named of the Constitution of Missouri.

In its motion for a new trial, appellant assigned as one ground that "the court erred in failing to hold Section 7047" *supra* to be unconstitutional and void because contrary to the various constitutional provisions above enumerated. This was the only reason, touching upon constitutional questions, assigned in that motion. The motion and all of the objections above mentioned were overruled, and exceptions were duly saved.

Under the heading of "Argument," appellant in its brief states its understanding of plaintiff's position:

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quotes from Section 7052 of the Revised Statutes of Missouri of 1909, and states its contention on the constitutional questions claimed to be involved, in the following language:

"It was the contention of the plaintiffs in the trial court that, by virtue of the statutes of Missouri respecting agents of foreign insurance companies, the effect of such statute was to make the agent, licensed to do business for such company, the agent of the insurance company in every particular so that he was, to all intents and purposes, the insurance company. The section (Sec. 7052, R. S. 1909) reads as follows:

" 'Any person or persons in this State who shall . . . make or cause to be made directly or indirectly, any contract of insurance for such company or association, shall be deemed to all intents and purposes an agent of such company or association.'

"This section, if interpreted to mean that one who makes an insurance contract shall be deemed the *agent of the company* and *not the agent of the assured* in every act entering into the *making of the contract*, is logical and constitutional. If construed to mean that one who issues or delivers a policy *forever after* is the agent of the insurance company *for every purpose*, world without end, it becomes an unconstitutional, unjust and oppressive act."

The entire argument under this point is directed to the alleged invalidity of Section 7052 *supra*. In Paragraph V of the argument, the following occurs:

"(c) The third instruction given on the part of the plaintiff is to the effect that if Dearing was permitted to countersign policies, then he had authority to agree to the assignment of the policy. We respectfully insist that such a construction of the statute makes the same violative of the constitutional rights of the defendant."

The statute here casually mentioned is, from the context, Section 7052 *supra*. The first reference made in the argument to Section 7047 is found on a succeeding page. It is apparent at a glance that there is no consti-

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tutional question involved in this case so far as Section 7052 *supra*, is concerned, for the plain reason that the constitutionality of that section was never called in question in the court below, as the record shows. It is the settled law of this State, declared in numerous decisions, that a constitutional question, to be available on appeal, must be made at the earliest opportunity that orderly procedure affords, and must thereafter be kept alive by appropriate steps. It cannot be raised for the first time in an appellate court, if it could properly have been raised in earlier stages of the proceeding. "This rule has been stated time and again until it should be considered no longer a matter of debate." [*Strother v. Railroad*, 274 Mo. 272, l. c. 277; *Lohmeyer v. Cordage Co.*, 214 Mo. 685, l. c. 689; *Miller v. Connor*, 250 Mo. 677, l. c. 684.] It follows that there is no constitutional question here as to Section 7052 *supra*.

A slightly different situation exists, so far as a constitutional question is concerned, as to Section 7047 *supra*. It will be noted that the only constitutional question preserved in the motion for a new trial is that relating to the alleged invalidity of Section 7047 *supra*. The pertinent portion of this section is as follows:

"Foreign companies admitted to do business in this State shall make contracts of insurance upon property or interests therein only by lawfully constituted and licensed resident agents, who shall countersign all policies so issued." [Sec. 7047, R. S. 1909.]

Turning to appellant's brief, we find one, and but one, assignment of error relating to constitutional questions, and that one is in these words: "The court, by rulings upon evidence and instructions, did so construe Section 7047, Revised Statutes 1909, as to deny defendant equal protection of the law, and said section, so construed, violates the constitutional rights and guarantees of the defendant." It thus appears that it is not the validity of the statute, but the validity of the trial court's construction of the statute, which is attacked on the grounds of unconstitutionality. Granting (without decid-

ing) that the trial court's construction was wrong, and granting (also without deciding) that, as thus wrongly construed, that section would be unconstitutional, does that state of affairs so introduce a constitutional question into this case as to bestow upon this court a jurisdiction which it would not otherwise have? We do not think so. We have decided many times that it does not.

"If the circuit court misconstrued the statutes and its ruling is permitted to stand, plaintiff will be deprived of his property when he ought not to be; but it by no means follows that he will be deprived of it without due process of law or in denial of the equal protection of the law. He will be deprived of it by an erroneous judicial decision, given after he had notice and his day in court. Such a mistake has been held time and again to constitute no denial of due process or of the equal protection of the law." [McManus v. Burrows, 217 S. W. 512, l. c. 514. See, also, Stegall v. Pigment & Chemical Co., 263 Mo. 719, l. c. 723, 173 S. W. 674; Sublette v. Railroad, 198 Mo. 190, 95 S. W. 430.]

The only other references to a constitutional question pertaining to Section 7047 *supra* which appear in appellant's brief are as follows:

Under "Points and Authorities," appellant asserts that Section 7047 *supra* is in violation of the constitutional provisions above named, and denies foreign insurance companies equal protection of the law; and under the head of "Argument," under Point Five, appellant says:

"The second instruction of the defendant refused by the court squarely raised the question of the constitutionality of Section 7047, Revised Statutes 1909. We respectfully submit that the same should have been given by the court."

This is not sufficient. A mere assertion of the existence of a constitutional question is not sufficient to confer jurisdiction. Questions of so grave a nature cannot thus lightly be raised. We think the assignment

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merely colorable and without merit. [Botts v. Railroad, 248 Mo. 56, l. c. 59 et seq.; Moore v. United Rys., 256 Mo. 165, l. c. 166; Stegall v. Pigment Co., 263 Mo. 719, l. c. 722; McManus v. Burrows (In re Gerhart), 217 S. W. 512.] We reach this conclusion the more readily from the fact that a mere reading of the statute in question is strongly persuasive that it is not subject to attack on constitutional grounds, under the facts in this case. It seems to be a reasonable regulation, applicable alike to all foreign insurance companies doing business in this State, and not open in any wise to the questions here attempted to be made concerning it, but we do not wish to be understood as now passing upon the constitutionality of Section 7047, *supra*. It is not before us. What is here said is by way of argument only. "There must at least be some substance to the constitutional question before it possesses the vitality to force jurisdiction here." [Carson v. Ry. Co., 184 S. W. 1039, l. c. 1041; State ex rel. v. Woodman, 193 S. W. 570.] The rule is the same in the United States Supreme Court. "It is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real, substantive question on which the case may be made to turn; that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this court.' " [WHITE, J., in Equitable Life Assurance Society v. Brown, 187 U. S. 311.] To the same effect, see SHIRAS, J., in St. Joseph Railroad Co. v. Steele, 167 U. S. 662, and BREWER, J., in Hamblin v. Western Land Co., 147 U. S. 532. We think counsel for appellant correctly stated his grievance, if any he has, concerning Section 7047 *supra*, as well as Section 7052 *supra*, when he complained of the trial court's construction of those sections. But, as we have shown, an erroneous construction of a statute does not give this court jurisdiction of the case on appeal, when it would not otherwise have it. And we are not to be understood as intimating that the trial court's construction of these statutes was erroneous.

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For the reasons above stated, we hold that we have no jurisdiction of this cause. It therefore should be transferred to the Kansas City Court of Appeals for decision upon the merits. It is so ordered. All concur.

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WILLIAM MAZE, Appellant, v. ERNEST BOEHM,  
et al.

Division Two, March 13, 1920.

1. **DEED: Mutual Mistake: Intention: Reformation.** A deed is presumed to express the final agreements of the parties only when it in fact expresses their intention. Where the intention of the parties is not expressed, but the deed recites mutual mistakes, a court of equity can reform it to express their intention.
2. ———: ———. **Character of Proof.** The burden of proof is on the party asserting that the deed did not express the intention of the parties, to establish the mistake and its mutuality, but such proof need not reach the high standard of beyond a reasonable doubt, but is sufficient if cogent, clear and convincing.
3. **LIMITATIONS: Possession: Pertinent to Good Faith.** Although a suit to quiet title does not turn on the question of adverse possession, but on the issue of mutual mistake in the description of the land in the deeds under which defendants claim, testimony regarding their possession is pertinent for consideration, as showing their good faith and intention in the transaction out of which their claim originated.

Appeal from Greene Circuit Court.—*Hon. Arch A. Johnson*, Judge.

**AFFIRMED.**

*Collins, Holloday & Stough and Hamlin & Hamlin*,  
for appellants.

(1) The deeds offered by the plaintiff established a complete chain of title in him, and a prima-facie presumption is indulged that they contain the ultimate intention of the parties. *Griffin v. Miller*, 188 Mo. 334. The bur-

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den is upon the party asserting a mistake. And the mistake must have been mutual. *Parker v. Vanhoozer*, 142 Mo. 627. Courts of equity do not grant the remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of error. *Brown v. Gwin*, 197 Mo. 506. (2) The possession of the bank, Bucheit and Boehm was not adverse, and did not put the Statute of Limitations in operation, because each only claimed to the true line, and did not know they were occupying land called for by plaintiff's deed. *Tamm v. Kellogg*, 49 Mo. 118; *Jacobs v. Moseley*, 91 Mo. 462. They did not claim to the line as fixed by the building, but claimed to own the land described in their deed. In order to have held adversely they must have known they were occupying plaintiff's land and claimed to own same. *McWilliams v. Samuel*, 123 Mo. 662.

*Levi Engle and T. J. Murray* for respondent.

(1) "Equity has power to" and "will reform a written contract, which by reason of a mutual mistake of fact, fails, in a material particular, correctly to express an actual previous oral agreement." *Henley v. Sullivan*, 248 Mo. 672; *Whittaker v. Lewis*, 264 Mo. 208. (2) "If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee, and will execute the trust by reforming the deed or by ordering a reconveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such mistake." *Perry on Trusts*, sec. 186; *Beach on Trusts and Trustees*, sec. 111; *Smith v. Walser*, 49 Mo. 250; *Neeffe v. Seeley*, 49 Mo. 209; *Fitch v. Gosser*, 54 Mo. 267; *Leitensdorfer v. Delphy*, 15 Mo. 160. (3) Visible possession is notice of the possessor's right and title. *Squires v. Kimball*, 208 Mo. 119; *Davies v. Briscoe*, 81 Mo. 27; *Shafer v. Detie*, 191 Mo. 391. (4) "The unquestioned possession of the respective parties

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measured the claim of each, and was for that reason evidence of their intention in the transaction which was the origin of that claim." *Fischer v. Dent*, 259 Mo. 91.

MOZLEY, C.—This is an action brought by plaintiff against defendants to recover possession of, and quiet title to, the following described real estate at Fair Grove, in Greene County, Missouri, to-wit: Beginning 70 links east and 434.9 feet south of the southwest corner of the northeast quarter of the northeast quarter of Section 29, Township 31, Range 20, thence west 124 feet, thence south 60 feet, thence east 124 feet, thence north 60 feet to the place of beginning. This description includes the particular land in controversy in the present action. It is described in the decree of the court below as follows: "Beginning 70 links east and 445.44 feet south of the southwest corner of the northeast quarter of the northeast quarter of Section 29, Township 31, Range 20, thence west 124 feet, thence south 10 feet, thence east 124 feet, thence north 10 feet to the place of beginning."

The petition contains two counts at law. The first alleges ownership in the plaintiff and demands judgment for certain rentals alleged to be due him and for possession of the premises; the second count is an ordinary action to quiet title.

Defendant Boehm filed a separate answer in two counts, the first admitting that he claimed to own the land in fee simple and generally denying the other allegations of the petition. The second count is in equity and sets forth that M. S. Murrell was the original owner of all the first described land; that on the 11th day of April, 1906, he and his wife sold said land to the Bank of Fair Grove and executed and delivered to said bank a deed therefor, and said bank, thereupon, went into actual possession thereof. The bank thereafter sold to L. L. Cox the north 20.5 feet, described as beginning at the northeast corner of the land in controversy, but owing to a mistake of the parties in the description contained in the deed, said land was erroneously described and did



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not convey the land intended to be conveyed. The bank continued in the actual possession of the land, claiming to own it, until May 3, 1909, when it sold the same, and other land adjoining it on the south, to one John Buchheit, and put him in possession thereof, but in making the deed to said Buchheit the land was mistakenly described and did not convey the premises intended to be conveyed. Buchheit took possession and remained therein until the 6th day of May, 1909, when he sold same and other lands adjoining it to defendant, Boehm, but owing to a mistake in making the deed said premises were not correctly described therein.

In the execution of the deeds in the chain of title which culminated in plaintiff, the same mutual mistake is present. Neither L. L. Cox, nor those claiming title to the land in controversy through or under him, including the plaintiff, ever bought or paid for or intended to buy and pay for said land in controversy, neither did they or either of them ever set up any claim or interest therein, except the plaintiff, and he not until the mistakes in the several deeds were discovered in the spring of 1916.

The answer also pleads the ten-year Statute of Limitations.

Defendant Sanders filed a separate answer which amounts merely to a general denial.

With the issues thus made up they were tried to the court on the 25th day of November, 1916, with the result that the court decreed the title of the land in suit in defendant Ernest Boehm, and divested all title and interest or apparent title and interest out of plaintiff and invested same in said defendant. The court further decreed the correction of the erroneous descriptions in said deeds so as to make them conform to and express the mutual intention of the parties.

After an unsuccessful encounter with a motion for new trial and a motion to arrest the judgment, plaintiff duly appealed to this court.

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I. Appellant makes five assignments of alleged error of the lower court which he says will justify this court in reversing the judgment. They are:

"1. The court erred in rendering judgment in favor of the defendant, because the same is unsupported by the evidence and is against the law; and because under the evidence and the law the judgment should have been for plaintiff.

"2. Because the record evidence showed that the fee-simple title is vested in plaintiff and that the court erred in holding the defendant proved an equitable title paramount to plaintiff's.

"3. Because the court erred in holding that a mistake had been made in the execution of the deed made by Murrell to the bank and by the bank to Buchheit and Cox.

"4. The court erred in allowing a witness to testify about a conversation he had with said Murrell, the plaintiff not being present, and any agreement they may have entered into would constitute no defense after the execution and delivery of the deed from said Murrell to said bank.

"5. Because the judgment was for the wrong party and was wholly against the law and the evidence."

Appellant, in his brief, includes all of the above assignments, except assignment number 4, under one head.

He first contends "that the deeds offered by plaintiff established a complete chain of title in him, and a prima-facie presumption is indulged that they contain the ultimate intention of the parties," and cites in support thereof *Griffin v. Miller*, 188 Mo. 334.

This could only be true where the conveyance expresses the intention of the parties in fact, but not true where from a mutual mistake made the intention of the parties is not expressed.

In the case cited and relied on by appellant the court, after stating that at the common law where a contract or agreement was committed to writing if complete on its face, it was conclusively presumed that all prior ne-

**Mutual  
Mistake.**

gotiations were merged in the writing and that the terms thereof could not be contradicted or varied by parol evidence, added further on the same page: "*But from time immemorial courts of chancery have exercised the right to correct written instruments which have been erroneously framed, as where it is admitted or proven that an instrument intended by both parties to be prepared in one form, has by an undesigned insertion or omission, been prepared or executed in another.*" (Italics ours).

That courts of equity have ample power to reform instruments burdened with mutual mistakes of the parties is no longer an open question in this State or any other State whose law we have had occasion to examine in our research upon this question in the instant case. [Horrine v. Ins. Co., 201 S. W. 958; Williamson v. Brown, 195 Mo. 313, l. c. 332-333; Parker v. Vanhoozer, 142 Mo. 627; Ins. Co. v. Lead Co., 169 Mo. App. 561; Dougherty v. Dougherty, 204 Mo. 228; Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 210 Mo. 729; Brown v. Gwin, 197 Mo. 506; 2 Pomeroy's Equity Jurisprudence, sec. 845; Thompson v. Phoenix Ins. Co., 136 U. S. 287, l. c. 295; Hartford Fire Ins. Co. v. McCarthy, 77 Pac. 90; Lansing v. Ins. Co., 93 N. W. 756; Corrigan v. Tiernay, 100 Mo. 277; Fischer v. Dent, 259 Mo. 86.]

It is true, as contended by appellant, that the burden of proof is on the party asserting the mistake and its mutuality as well. This is abundantly established by the authorities cited supra, but such proof need not reach the high requirement of "beyond a reasonable doubt."

In the case of Williamson v. Brown, supra, and many other cases, this court granted a decree to reform the instrument where there was a conflict in the evidence, the testimony, however, to establish that the mistake was made and the mutuality of the parties in making it, must be clear, cogent and convincing.

In the instant case the mistakes and their mutuality are conceded to have been made and to exist by the parties to the action. The plaintiff testified: "*In the latter part of February, 1916, I found that the land described*

*in my deed only took half of my store building and including half of another store building occupied by Mr. Boehm's tenant.*" (Italics ours). This is a positive concession by both sides that the mistake existed and that they were mutually made, and therefore, fully meets the requirement of the rule that the proof must be clear, cogent and convincing, and with more certainty of its correctness.

Under the certainty of the existence of said mistakes and of their mutuality, the court not only had the power, as above pointed out, but it was its duty to decree a reformation thereof in accordance with the facts. We rule the point against appellant.

II. Under "Points and Authorities" appellant directs an argument to the effect that the Statute of Limitation has no application to the case and that the court erred in giving it consideration. Appellant made no objection to the testimony in regard to possession in the course of the trial, nor did he assign it as error either in the motion for new trial or in arrest of the judgment, and for this reason the contention might be disregarded under the rules of this court; but we deem it proper to say that the case did not turn on the question of adverse possession in the court below. Such testimony was, however, pertinent to be considered as showing the good faith of defendants and their intention in the transaction which was the origin of their claim. *Fischer v. Dent*, supra. The contention is without merit and will be overruled.

We hold that the judgment of the lower court was correct under the law and, accordingly, affirm it. It is so ordered. *Railey and White, CC.*, concur.

PER CURIAM:—The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

THE STATE v. EARNEST HOWARD BARNES,  
Appellant.

Division Two, March 13, 1920.

1. **INFORMATION: Sufficiency: All Words of Statute.** The Constitution declares that in criminal prosecutions the accused shall have the right to "demand the nature and cause of the accusation," and that means that the information shall specifically bring the accused within all the material words of the statute he is charged with having violated. In criminal pleading it is an inflexible rule that, in the indictment or information for a felony, nothing can be left to intendment or implication.
2. ———: **Carnal Knowledge: Age of Accused.** Where the statute in force at the time declared that "if any person over the age of seventeen years shall have carnal knowledge of any unmarried female of previous chaste character," etc., he shall be guilty of a felony, an information charging that the defendant was "then and there over the age of sixteen years," is fatally defective. To have been a sufficient information it should have specifically alleged that he was at the time over the age of seventeen years. [Distinguishing *State v. Allen*, 267 Mo. 49, and *State v. Volz*, 190 S. W. 307.]
3. ———: ———: ———: **Cured by Evidence.** Nor was such fatal defect in the information cured by testimony showing that at the time the offense was committed defendant was over seventeen years of age.
4. ———: ———: ———: **Statute of Jeofails.** Nor is the fatal defect in the information alleging defendant was over the age of sixteen years of age at the time the offense was committed, when the statute requires him to have been over seventeen years of age, cured, after verdict of guilty, by the Statute of Jeofails (Sec. 5115, R. S. 1909).
5. **EVIDENCE: Cross-Examination of Own Witness: New Matter.** Where a witness for defendant, on his cross-examination by the State, has testified to material new matter, the counsel for defendant, in re-examining him as to such new matter, is entitled to a specific answer, and an objection to such re-examination is not to be sustained on the theory that he is defendant's witness and defendant's counsel is not entitled to cross-examine him. The new matter having been brought out by the State, defendant is en-

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titled to have the witness state exactly what defendant said to him, and not his mere conclusion.

6. **JUDGMENT: Carnal Knowledge: Seduction.** Where defendant is charged with statutory rape, a judgment finding him guilty of seduction is erroneous.

Appeal from Newton Circuit Court.—*Hon Charles Henson*, Judge.

REVERSED AND REMANDED.

—*M. E. Benton and Horace Ruark* for appellant.

(1) The information is bad in that everything charged in the information may be true and the defendant still not guilty of any offense. He might have been over sixteen and under seventeen years of age at the time of the alleged crime. *State v. Wade*, 267 Mo. 256; *State v. Bengsch*, 170 Mo. 104; *State v. Thieraup*, 167 Mo. 429; *State v. Hogan*, 164 Mo. 654; *State v. Buster*, 90 Mo. 518; *State v. Timeus*, 232 Mo. 184; *State v. Phelan*, 159 Mo. 122; *State v. Holden*, 48 Mo. 93; *State v. Hessel-tine*, 130 Mo. 468; *State v. Evers*, 49 Mo. 542; 2 Bishop, Criminal Procedure, sec. 818; *Schramm v. People*, 220 Ill. 16; *Hubert v. State*, 74 Neb. 220. It is the cardinal rule of criminal pleading, that in an indictment or information for felony, the information must charge every essential fact constituting the offense with certainty. Nothing can be left to intendment or implication. *State v. Timeus*, 232 Mo. 177; 1 Bishop's Criminal Procedure, sec. 81; *State v. Rector*, 126 Mo. 340; *State v. Ferguson*, 152 Mo. 92; *State v. Hall*, 130 Mo. App. 174; *State v. Basket*, 52 Mo. App. 389; *State v. Sparrow*, 52 Mo. App. 374; *State v. Raymond*, 54 Mo. App. 425. This defect in the information is not cured by the Statute of Jeofails. *State v. Meek*, 70 Mo. 358; *State v. Cline*, 264 Mo. 416; *State v. Woodward*, 191 Mo. 631; *State v. Blan*, 69 Mo. 317; *State v. Green*, 111 Mo. 588. (2) The court erred in refusing to permit the defendant to re-examine the witness Lee Boydston as to matters brought out by the

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State in cross-examination. *State v. Coats*, 174 Mo. 423; 14 Ency. Evidence, 619; 8 Ency. Pleading and Practice, 124-125.

*Frank W. McAllister*, Attorney-General, *Lewis H. Cook*, Special Assistant, for respondent.

(1) The information follows the approved form of this court in all material matters with one exception. *State v. Perrigan*, 258 Mo. 233. (2) The information was drawn under Sec. 4472, R. S. 1909, and reads in part that "he, the said Earnest Howard Barnes, being then and there over the age of sixteen years," etc. The carnal knowledge occurred on February 25, 1917. The Laws 1913, p. 219 (approved March 25, 1913), amend Sec. 4472, R. S. 1909, so that this part of the information should have read "over the age of seventeen years." The evidence conclusively shows by the testimony of the mother of the defendant and other witnesses that he was nineteen years old at the time of the carnal intercourse alleged. So this erroneous averment as to the statutory minimum does not prejudice defendant in any way. *State v. Allen*, 267 Mo. 49; *State v. Volz*, 190 S. W. 307. (3) The defendant was charged with carnal knowledge of a woman between the ages of fifteen and eighteen years of age and convicted of this charge. The record shows that when sentence was pronounced defendant was sentenced to the penitentiary not for the carnal intercourse of which he had been convicted, but for seduction. Unless it can be said that carnal knowledge, statutory rape and seduction can be used synonymously the case should be reversed and remanded. In the case of *State v. Weber*, 272 Mo. 475, appellant was charged under Sec. 4472, R. S. 1909, as amended by Laws 1913, p. 219, with carnally knowing a woman between fifteen and eighteen years of age and a general verdict was returned finding defendant guilty as charged, etc. The opinion states that the information charges statutory rape. The material elements of the crime are identical

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and so it is in seduction. While the sentence is not strictly in accord with the verdict the departure is one of language merely. If this contention is not well taken, we concede, by the authority of *State v. Duff*, 253 Mo. 415, 423, that this is no judgment. If so, we respectfully ask that the court reverse the case and remand it back to the Newton County Circuit Court in order that the defendant may be properly sentenced.

RAILEY, C.—On October 9, 1918, the prosecuting attorney of Newton County, filed in the circuit court of said county, an information, which, without formal parts, reads as follows:

“Now comes Leo H. Johnson, Prosecuting Attorney within and for the County of Newton in the State of Missouri, under his oath of office and upon his information and belief and upon the duly verified affidavit of Edith J. Cherry, informs the court and presents and charges to the court that:

“Earnest Howard Barnes, on the 25th day of February, A. D. 1917, at the County of Newton and State of Missouri, did unlawfully and feloniously make an assault upon one Edith J. Cherry, he, the said Earnest Howard Barnes, being then and there a person over the age of sixteen years, and she, the said Edith J. Cherry, being then and there an unmarried female of previous chaste character and between the ages of fifteen and eighteen years of age, to-wit, of the age of fifteen years; and her, the said Edith J. Cherry, he, the said Earnest Howard Barnes, did then and there unlawfully and feloniously have carnal knowledge of abuse contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.”

On October 14, 1918, defendant waived formal arraignment and entered his plea of not guilty. The case was tried before a jury on February 28, 1919, and on said date the following verdict was returned:

“We, the jury, find the defendant guilty and assess his punishment at 2 years in the penitentiary.”



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Defendant, in due time, filed his motions for a new trial and in arrest of judgment. Both motions were overruled, sentence pronounced on defendant, and judgment entered on the verdict aforesaid.

In due time and form, defendant was granted an appeal to the Supreme Court.

His counsel have filed a brief in this court, the first page of which, contains the following:

"The evidence shows the usual contradiction of testimony. The prosecuting witness, Edith Cherry, affirming and the defendant denying the act of intercourse. The evidence is sufficient to sustain the verdict of the jury, and the appellant makes but two contentions upon this appeal. First: That the information is bad; and second, that the court erred in refusing to permit the re-examination of a witness, Lee Boydston."

The evidence of the State tends to show that the sexual intercourse complained of occurred in Newton County, Missouri, on February 25, 1917; that Edith J. Cherry, the prosecutrix, was then over fifteen years of age and under eighteen years of age; that she had never had sexual intercourse with any one prior to said date; that as a result of the above act of sexual intercourse, the prosecutrix, on November 24, 1917, gave birth to a baby girl; that the defendant was the father of said child; that defendant on said 25th day of February, 1917, was over the age of seventeen years; that prosecutrix was an unmarried female at the time of trial, and had never been married.

The evidence of defendant tended to contradict that of respondent, except as to defendant's age. Appellant likewise offered testimony tending to show that prior to February 25, 1917, the reputation of the prosecutrix in that neighborhood for chastity, was bad. He likewise offered testimony tending to show that on February 25, 1917, he was in Oklahoma, etc.

Appellant, in his abstract of the record, says: "As no question is raised by the defendant as to the giving or refusing of instructions, they are not set out herein."

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We have examined the instructions given by the court and find that they fairly, correctly and fully cover all the issues in the case.

Such other matters, appearing of record, as may be necessary, will be considered in the opinion.

I. Appellant, in his motion in arrest of judgment, as well as in his brief on file here, challenges the sufficiency of the information heretofore set out. As the act complained of, is said to have occurred on **Information.** February 25, 1917, the validity of the information will have to be determined under Section 4472, Revised Statutes 1909, as amended by the Act of 1913, Laws of 1913, at pages 218-9, which reads as follows:

"If any person over the age of seventeen years shall have carnal knowledge of any unmarried female of previous chaste character, between the ages of fifteen and eighteen years of age, he shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding five years, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than one month nor more than six months, or by both such fine and imprisonment, in the discretion of the court."

In passing upon the validity of foregoing information, we should keep in mind Section 22 of Article II. of our Constitution, which provides, among other things, that in criminal prosecutions the accused shall have the right, "*to demand the nature and cause of the accusation.*" In other words, it provides, that the information shall specifically bring the defendant within *all* the material words of the statute, for it is the inflexible rule in criminal pleading that, in all indictments or informations for felonies, nothing can be left to intendment or implication. [State v. Wade, 267 Mo. l. c. 256; State v. Timeus, 232 Mo. 177; State v. Keating, 202 Mo. l. c. 204; State v. Birks, 199 Mo. l. c. 271; State v. Meysenburg, 171 Mo. 1; State v. Thierauf, 167 Mo. 429; State v. Hagan, 164

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Mo. 654; State v. Furgerson, 152 Mo. 92; State v. Evans, 128 Mo. 406; State v. Austin, 113 Mo. l. c. 543; State v. Buster, 90 Mo. l. c. 518; State v. Gabriel, 88 Mo. l. c. 642; State v. Hayward, 83 Mo. l. c. 304 and cases cited; Schramm v. People, 220 Ill. 16; Hubert v. State, 74 Neb. 222; Wharton's Crim Pl. & Prac. (9 Ed.) sec. 220; 1 Bishop's Crim. Procedure, secs. 81, 86, 88, 519.]

Reverting to the Act of 1913, page 219, we find that the information must, in order to meet the requirements of the law, specifically show the following: (1) That the person charged, must have been over seventeen years of age when the alleged offense was committed; (2) that the person charged had carnal knowledge of an unmarried female of previous chaste character; (3) that the latter, at the time of the offense, was between the ages of fifteen and eighteen years. Tested by the authorities heretofore cited, the information before us is fatally defective, in failing to allege that defendant, on February 25, 1917, was *over* the age of *seventeen* years. The averment, that defendant, on said date, was *over sixteen years of age*, was not equivalent to an allegation, *that he was then over seventeen years of age*. He may have been *over sixteen* at said date, and yet *less* than seventeen years of age. The information would have been as valid, without mentioning defendant's age, as to have stated it in the language of the complaint. If an information can be upheld without prerequisite number 1 *supra*, then either of the other two requirements, or both, might be dispensed with for the same reason. The defendant is charged with statutory rape, and has been convicted on an information which does not contain one of the material averments necessary to constitute the offense.

It is suggested in the brief of respondent that the testimony shows defendant was over seventeen years of age on February 25, 1917, and that he was not injured by reason of the failure of the complaint to so allege. In support of the above suggestion, we are cited to State v. Allen, 267 Mo. 49, and State v. Volz, 190 S. W. 307. We

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do not think the facts in either of the above cases are similar to those at bar.

In *State v. Allen*, the information was filed on February 5, 1914, after Section 4472, Revised Statutes 1909, was amended by the Act of 1913, Laws 1913, pages 218-9. The prosecutrix was assaulted, according to the information, in March, 1913, while Section 4472, *supra*, was still the law of the State. The information alleged that defendant, at the time of said assault, was over seventeen years of age, while the prosecutrix was then alleged to be between fifteen and eighteen years of age. Now, the information having alleged, and the evidence having disclosed, that defendant in the *Allen* case was over seventeen years of age at the time of the offense, he was clearly brought, so far as his age is concerned, within the provisions of both Section 4472 *supra* and the amendatory Act of 1913. The information charged that the prosecutrix, at the date of the assault, was between fifteen and eighteen years of age. This was a sufficient allegation as to her age, under either Section 4472 or the present law. The evidence in above case disclosed that the allegations of the complaint were correct as to the respective ages of defendant and the prosecutrix. It was held that defendant had not been prejudiced by reason of the foregoing allegations in respect to the respective ages of defendant and the prosecutrix. In other words, as the information in the *Allen* case charged that defendant was over seventeen years of age, when he committed the assault, it would have been sufficient, as to his age, under either Section 4472 or the Act of 1913. This must necessarily be true, as the allegation of seventeen years, in regard to his age, would cover the sixteen years specified in Section 4472 *supra*.

In *State v. Volz*, no question was raised, or considered by the court, as to the sufficiency of the information. The court held in above case that an instruction, which required the jury to find that defendant was over sixteen years of age, was harmless, where the uncontradicted evidence fixed his age at twenty-one.

We are of the opinion that neither of the above cases cited deal with the subject now before us. To sustain the validity of the information at bar would not only be in contravention of the constitutional provision heretofore mentioned, but in direct conflict with the well established principles of law enunciated in the long line of well considered cases heretofore cited.

(a) In the case of *State v. Allen*, 267 Mo. 49, heretofore considered, at page 56, the court cited Section 5115, Revised Statutes 1909, known generally as the Statute of Jeofails, in support of its contention that defendant had not been prejudiced by the language of the information charging him with having been seventeen years of age, at the time of the alleged assault, when Section 4472, Revised Statutes 1909, authorized his conviction if he was over sixteen years of age. The court, in above case, did not hold that an information would be good under the present law, which failed to charge that defendant was over seventeen years of age when the assault was committed. Nor, on the other hand, does the Statute of Jeofails, *supra*, render valid an information, under the present law, which fails to aver that defendant, at the time of the assault, is over the age of seventeen years. [*State v. Cline*, 264 Mo. l. c. 419-20; *State v. Woodward*, 191 Mo. l. c. 631; *State v. Green*, 111 Mo. l. c. 588; *State v. Meek*, 70 Mo. l. c. 358; *State v. Blan*, 69 Mo. 317; *State v. Pemberton*, 30 Mo. 376.]

II. Defendant complains of the action of the court in sustaining the State's objection to a certain inquiry propounded to defendant's witness, Lee Boydston, on re-examination. In order to pass upon the question intelligently, we will give the whole of the re-examination of said witness by defendant, up to and including the question at issue, which reads as follows:

**New Matter:**  
**Cross Examination.**

"Q. When was this medicine bought, when you were working for him (defendant)? A. Yes, sir.

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"Q. And that was sometime between the 5th or 6th of February and the last of February? You quit the last day of February I believe? A. Yes, sir.

"Q. You wasn't getting any medicine for an abortion for this girl at this time was you? A. He didn't tell me what he was getting that for anyway.

"Q. Wasn't it something he got to use on the machine? A. He didn't tell me what he got it for.

"Q. He was asking you if Mr. Barnes here, Howard, didn't say something to you about sending him some word. I wish you would just tell us what it was, in your own way, what it was Barnes said to you if you can remember. A. I can't remember the exact words. Something like I told him.

"Q. The substance of it as well as you can remember. I would like to get your idea? A. I told Mr. Tadlock the best I could.

"Q. *Now can't you tell us just what it was Mr. Barnes said, as well as you can remember?*

"Mr. Tadlock: If the Court please, this is their witness. I don't think they ought to cross-examine.

"The Court: The objection will be sustained."  
(Italics ours.)

An exception was duly saved as to said ruling.

This witness was introduced by defendant for the purpose of showing that defendant was in Oklahoma on February 25, 1917, when the assault is charged to have occurred. Counsel for the State, as new matter, sought to show by the witness that defendant had bought certain medicine, and told witness, that if anything happened to the little girl to let him know. The witness answered the questions propounded by the State, in a very indefinite and uncertain manner, but left the impression that defendant had bought some medicine, and that he had requested witness to let him know if anything happened to the little girl. Witness was being re-examined by counsel for defendant, as to the new matter brought out by the State, when the above objection was sustained by the court. This evidence, if believed by the jury, was very damaging to defend-

ant, as it tended to corroborate the prosecutrix. The appellant had the right, as a part of his legitimate re-examination of his own witness, in respect to the new matter brought out by the State, to ask the witness the question ruled out by the court. It was neither leading, suggestive nor improper as to form. On an important matter of this character, he had the right to call upon the witness to state what was actually said, rather than leave the conclusion of the witness to stand as the evidence in the case.

As the cause will have to be re-tried, it is not necessary to consider this question further.

III. The Attorney General, in his brief, has called our attention to the erroneous judgment entered in this case. Defendant was charged with statutory rape, and according to the judgment was found guilty of seduction. Section 4478, Revised Statutes 1909, defines seduction under promise of marriage, but defendant was not charged in the information with any such offense. This would necessitate a reversal of the case in order that a proper judgment might be entered (State v. Duff, 253 Mo. l. c. 423), but as the case is being reversed and remanded for other reasons, we simply call attention to above, in order that a proper judgment may be entered, should the defendant be found guilty on a re-trial of the case.

IV. On account of errors heretofore mentioned, the case is reversed and remanded. *White and Mozley, CC.*, concur.

PER CURIAM.—The foregoing opinion of RAILY, C., is hereby adopted as the opinion of the court. All of the judges concur.

## THE STATE v. DEWEY HOBSON PALMER, Appellant.

Division Two, March 13, 1920.

1. **EVIDENCE: Other Disconnected Difficulties.** Evidence of quarrels and violent threats by defendant with other parties, prior to the homicide but on the same night, with which deceased was in no wise connected and was not present, is not admissible.
2. **VENUE: How Proven.** Venue in a criminal case may be established in the same way as any other material fact. It may be established by direct testimony, or it may be inferred by the jury from all facts and circumstances in evidence from which the inference may be reasonably drawn. The inference that the homicide was committed in the county in which the information was filed may be drawn from testimony showing that a certain school house was in the county and west of its east county line, and that deceased was shot 650 feet west of the school house.

Appeal from Howard Circuit Court.—*Hon. A. W. Walker, Judge.*

REVERSED AND REMANDED.

*R. M. Bagby* and *Sam C. Major* for appellant.

(1) The record in this case is silent as to where this offense was committed. The evidence shows that it was close to the boundary line between Howard and Boone counties. The only evidence in the record as to the venue is that the offense was committed near Arnett's school house, but the record is silent as to what county Arnett's school house is located in. The court can take judicial notice of the boundaries of a county, but it cannot determine that a school house is in a certain county where the evidence is silent on the subject. *State v. Hartnett*, 75 Mo. 251; *State v. Hughes*, 82 Mo. 86; *State v. King*, 111 Mo. 576; *State v. McGinnis*, 74 Mo. 245;



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State v. Burgess, 75 Mo. 541; State v. Bush, 136 Mo. App. 608. (2) The court erred in admitting the illegal and irrelevant testimony concerning the details of a difficulty which took place twenty minutes before the difficulty between the deceased and this defendant, to-wit: the difficulty between the defendant and Frank and Nina Patton and Bill Patton. This difficulty had nothing whatever to do with the difficulty in which the deceased was shot. It transpired, according to the testimony of the State's own witness, twenty minutes prior to the difficulty between deceased and the defendant, and after the event had closed and the Pattons had gone a quarter of a mile across the Ewing field and the defendant had gone down the road with his brother and was waiting for the witness, Newt Hill. It was not a part of the *res gestae* and should not have been introduced under this guise. Wharton's Criminal Evidence (9 Ed.), sec. 264, p. 198; State v. Guinn, 174 Mo. 680.

*Frank W. McAllister*, Attorney-General, and *Henry B. Hunt*, Assistant Attorney-General, for respondent.

(1) The evidence concerning the altercation between appellant, and the Pattons and Bessie Level, should not have been admitted. The deceased was not present, and took no part in this affair, and did not encounter appellant until after this quarrel was over. 21 Cyc. 929; State v. Swain, 68 Mo. 612; State v. Clayton, 100 Mo. 520; Joyce v. Com., 78 Va. 290; Sewell v. Com., 3 Ky. L. R. 86; State v. Crabtree, 111 Mo. 141. (2) The question of venue is always a question of fact, and it may be proved like any other fact. State v. Burns, 48 Mo. 438; State v. West, 69 Mo. 404; State v. Shour, 196 Mo. 223; State v. Lee, 228 Mo. 497; State v. Schatt, 128 Mo. App. 624; State v. Gow, 235 Mo. 325; State v. McCawley, 180 S. W. 870.

MOZLEY, C.—On the 14th day of April, 1917, the prosecuting attorney of Howard County, in vacation of

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the court, filed an information against defendant, Dewey Hobson Palmer, charging him with having shot and killed Millard P. Wright under such circumstances as to constitute murder in the second degree. The information charges that the killing occurred in the County of Howard and State of Missouri. On the 6th day of November, 1917, defendant was put on trial in said county and convicted by a jury of murder in the second degree and his punishment fixed at twenty years in the State Penitentiary.

At the close of the State's case defendant demurred to the evidence, which was overruled by the court, and again at the close of the whole case the demurrer was renewed, but met a similar fate. Exceptions were duly preserved to these rulings and are set forth in the record before us. Motion for new trial was filed within the time allowed by law and, on the 1st day of April, 1918, it was overruled by the court and exceptions duly saved. The case is regularly here on defendant's appeal.

On the night of January 6, 1917, Jim Skinner, who lived in the eastern part of Howard County, near the dividing line between that county and Boone County, gave a dance, at which both defendant and the deceased were present, but there was no trouble of any kind between them. Defendant was sober. Deceased and his associates were drinking; had whisky with them, and deceased was more or less under its influence. A Mrs. Bessie Level, to whom defendant was paying court and whom he afterward married, was at the dance, in company with Bill Patton. When the dance subsided (which was past eleven o'clock at night) Mrs. Level and her escort, and Frank Patton and his wife, Ina Pearl Patton, and their three children, started home. Defendant wishing to speak with Mrs. Level rode up behind them on his horse and called to Mrs. Level, who stopped to talk with him and the conversation soon developed into a vulgar quarrel between defendant, Mrs. Level and Frank Patton and his wife, in which defendant it is said by the testimony of the Pattons to have made the most

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dire threats against anyone who dared to accompany Mrs. Level, insisting that he would attend to that duty himself, and coupling his threats with the most shocking obscenity and vile epithets. The matter terminated, however, in Mrs. Level and the Pattons, after the quarrel was over, proceeding on their way towards the home of Pattons.

After these parties had started through the field towards their home, Arthur Palmer, a brother of defendant, who had come during the quarrel, and defendant got on their horses and started west to go home; they had gone a short way when Newt Hill called to them to wait, as he was going their way. They waited for him and while so doing they heard some horses coming down the road towards them; they turned their horses around in the road and stood there. A loose mule was running towards them, and they could see horses with riders on them strung along the road coming toward them. Defendant told his brother to catch the mule, which he did, and was holding it by the bridle when the approaching parties (who proved to be deceased, Millard Wright, and Paul Cook) came up.

The testimony as disclosed by the record is conflicting from this time as to what happened between the time of the arrival of deceased and Cook, and what was said and done by defendant and deceased just before and when the fatal shot was fired. This conflicting testimony was submitted to the jury and their finding was favorable to the contention of the State.

At the trial of the case the court admitted, over the objection of defendant, all of the testimony in relation to the quarrel or difficulty between defendant and the Pattons which occurred before the trouble between deceased and defendant and when deceased was not present. As the admission of this testimony is challenged by appellant as being reversible error, we set it out in full:

Mrs. Frank Patton, stated as follows: "We took the southeast path through the woods to the main road. As

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we were passing through the woods to the main road, the defendant, Hop Palmer, rode up behind Bessie Level and told her to come back, that he had something to tell her. He called her three times before she went. He stepped off his horse and took hold of her arm and said: 'Now, God damn you, you will walk with me to Ina Patton's tonight or there won't any son of a bitch in this crowd go up this path.' He asked Bessie why she came to the dance, and says: "I told you I would kill you, if you came to the dance." Bessie left Hop Palmer just as we crossed the main road and rejoined Bill Patton. When we got to the road I told Hop we had heard enough --not to go any further. He threatened to kill every son of a bitch of a Patton, and said there was nothing to them and never was. He asked my husband out into the road. I would not let him go and told Hop he was like the Oklahoma wind, that I had heard it before. I told him to go on down the road home. When he asked us to go out in the road, he threw off all his coats. When we left him, he was cursing, but I did not listen any longer."

Frank Patton testified: "After we left Skinner's house, I saw the defendant, Hop Palmer. He came down the path following me and called Bessie Level. He told Bessie he wanted to see her. He got down off his horse. He took Bessie Level by the arm and he says, 'I am going to walk with you to Ina Patton's.' He says, 'No son of a bitch walks up through these woods if I don't.' He walked with Bessie to the big road and there threw off his coat down in the road. My wife says: 'Go on down the road Hop. You are like the Oklahoma wind.' He says to my wife: 'The damned son of a bitch, come out in the road and I will show you what I can do for you;' and he says: 'Frank, if I ever catch you off your farm I expect to kill you.' And at that we left." Substantially the same facts were testified to by Will (Bill) Patton.

I. The State's contention that the filing of the bill of exceptions is not shown by the record, we think is not well taken. In our opinion the fact of its filing does

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**Bill of  
Exceptions.** sufficiently appear by the record and that it is  
our duty to review the bill in passing on the  
case.

**Other  
Difficulties.** II. It is earnestly insisted by appellant that the  
testimony set out above relates solely to a difficulty with  
other parties and that it is wholly disconnected with, and  
different from, the offense charged against de-  
fendant in the information, and that it was  
therefore error prejudicial to his defense  
against said charge.

It will be observed that there was no trouble and  
had been none between deceased and defendant until  
they met in the road where Arthur Palmer, a brother  
of defendant, had, at defendant's request, caught the  
runaway mule. It was at that time and place that the  
difficulty between the two and in which deceased lost his  
life occurred. The trouble defendant had with the Pat-  
tons had ended some time before and they were gone.  
Nothing that was said or done in the Patton quarrel in  
any way referred to deceased, nor was deceased present  
while it was going on.

The State concedes in its brief and in oral argument  
at our bar that the admission of said testimony was er-  
ror, and the authorities cited by the State in its brief  
fully support the concession made. [21 Cyc. 929; State  
v. Swain, 68 Mo. l. c. 612; State v. Clayton, 100 Mo. 520,  
and State v. Crabtree, 111 Mo. l. c. 141.]

These authorities expressly hold that "evidence of  
a previous difficulty between defendant and a third per-  
son with which deceased had no connection and which  
was not a part of the transaction in which deceased was  
killed, is not admissible."

III. Appellant makes the point that the venue was  
not proven. Venue in a criminal case may be established  
the same way as any other material fact, that is,  
**Venue.** by direct testimony, or it may be inferred by the  
jury from all facts and circumstances in evidence in the  
event that such facts and circumstances reasonably jus-

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tify such inference. As there is no direct evidence showing the venue of the crime charged to be in Howard County we look to the facts and circumstances in proof to ascertain if the jury were justified in drawing the inference therefrom that it was in fact in said county.

The proof shows that Jim Skinner (who gave the dance) lives in Howard County about two miles west of the Boone County line; it shows that Frank Patton and his family (to whose home deceased was taken after he was shot) lives in Howard County about one mile from the Boone County line; it shows that a public road extends east and west; that Skinner lives a short distance north of this road and Patton a short distance south of said road. This road passes by the Arnett school house which is in Howard County and is the point that the county highway engineer measured from, westward a distance of 650 feet, to the point in the road where deceased was killed. We think under this testimony and under the authority of the cases of *State v. Sanders*, 106 Mo. 195; *State v. Lee*, 228 Mo. 497, and *State v. McCawley*, 180 S. W. 870, and under the further fact that defendant was informed against in Howard County and the jury instructed that they must find that the alleged crime was committed in Howard County, that their conclusion that the situs of the offense was in Howard County was a legitimate and reasonable deduction therefrom. We therefore overrule this contention.

IV. Appellant makes a number of additional assignments of alleged error which we think are unnecessary to be reviewed, since upon retrial they may be avoided.

It follows from what has been said that the case will have to be reversed and remanded for retrial. It is so ordered.

*Railey and White, CC., conur.*

PER CURIAM:—The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

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FRED K. LOCK v. CHICAGO, BURLINGTON AND  
QUINCY RAILROAD COMPANY, Appellant.

In Banc, March 15, 1920.

1. **EVIDENCE: Substantial for Plaintiff: Appellate Practice.** If plaintiff's testimony that he stumbled over a brake-beam lying in defendant's railroad yard is substantial, and is not contrary to reason, the appellate court will accept the verdict of the jury finding it to be true.
2. **DANGEROUS PLACE: Brake-Beam in Yards: Constructive Notice of Location.** At different times cars were repaired in defendant's railroad yard, their parts separated, and it was customary to take out brake-beams and drop them near at hand, to be subsequently removed; a car was being repaired near the scene of the accident on the day preceding it; the yard belonged to defendant and was fenced; and plaintiff, a switch-tender, testified that having aligned the rails so as to permit a train to pass, at four o'clock of a dark and rainy December morning, he started to walk across the yard to a shanty where he stayed when not engaged in adjusting the switches, and while looking ahead to determine his course, he stumbled over a brake-beam, fell to the ground, and before he could arise a switch engine on a lead track struck him. *Held*, that the other facts were circumstances confirmatory of plaintiff's testimony, and that, under the Federal Employers' Liability Act, defendant cannot escape liability on the ground that the evidence failed to show it had either actual or constructive notice of the location of the brake-beam.
3. ———: ———: ———: **Act of Servant.** Under the Federal Employers' Liability Act, a switch-tender is not required to show a negligent placing of a brake-beam in the railroad yards, over which he stumbled and fell; but the leaving of the beam at said point was a negligent act and bound the company as effectually as if it, as principal, had left it there.
4. ———: ———: **Assumption of Risk.** A switch-tender, having aligned the tracks at the switches and started to the shanty where he stayed when not so engaged, at four o'clock on a dark and rainy December morning, had a right to assume that the railroad company had exercised proper care to provide a reasonably safe place for him to work, free from any obstacles which would cause his injury, and that a brake-beam, over which he stumbled, had

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not been left in the yard over which he customarily passed; the leaving of the beam in such place, at such time, did not constitute a risk normally incident to his employment.

5. ———: ———: **Evidence of Customary Acts.** Where the railroad yard through which the switch-tender passed in going in the night time to a shanty in which he stayed between his acts in aligning tracks, was used by defendant in the conduct of its business, testimony that it was the practice of the employees to scatter materials over the yard in repairing cars is admissible, the switch-tender having stumbled over a brake-beam in the yards and having been injured thereby. While such acts are in a sense collateral, an inference of fact bearing on the particular act of negligence may properly be drawn from them.
6. ———: ———: **Collateral Fact.** The rule is that if a collateral fact bearing on the main issue is so intimate and valuable as to tend to prove the main fact, it is competent evidence.
7. **DAMAGES: Under Federal Act: Contributory Negligence: Instruction.** It is proper to instruct the jury, in a suit for personal injuries brought under the Federal Employers' Liability Act, that the amount of plaintiff's damages may be reduced in the proportion that his own negligence contributed to his injury; and the instruction on the subject in this case is unobjectionable.
8. **VERDICT: Excessive: \$10,000.** Under the Federal Act, an injured employee is entitled to such damages as will compensate him for expenses incurred, loss of time, suffering and diminished earning power, and the amount recoverable is not otherwise limited or restricted, except where he has been guilty of contributory negligence; and there being no such negligence, a verdict of \$10,000 for the loss of an arm and a gash above the eye which impairs the sight, supported by substantial evidence and approved by the trial court, vested with authority to set it aside if excessive, is approved.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb*, Judge.

*Affirmed.*

*H. J. Nelson, Bailey & Hart, Palmer Trimble and M. G. Roberts* for appellant.

(1) The instruction in the nature of a demurrer to the evidence offered at the close of plaintiff's case and



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again at the close of all the evidence, should have been given. (a) In actions under the Federal Employers' Liability Act negligence is essential to a recovery and it is an affirmative fact, which must be established by competent evidence. The statute prescribes that the "defect or insufficiency" in the "track" or "roadbed" causing the injury must be "due to negligence." *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492; *Fish v. Railroad Co.*, 263 Mo. 106; *Erie R. Co. v. Winfield*, 244 U. S. 172; *New York C. R. Co. v. Winfield*, 244 U. S. 150; *New Orleans Railroad Co. v. Harris*, 38 Sup. Ct. Rep. 535. (b) Prior knowledge on the part of the employer of the existence of a negligent defect must be shown. Proof of an injury and an obstruction on the master's premises, i. e., that the defect existed at the time of the injury, is not sufficient to show prior knowledge, actual or constructive; for the fact of an accident carries with it no presumption of negligence on the part of the employer. On the contrary, in the absence of affirmative proof showing prior knowledge of the defect, the injury is to be attributed to causes for which the master is not liable. *Haggard v. McGrew Coal Co.*, 200 S. W. 1072; *Elliott v. Railroad*, 204 Mo. 14; *Winslow v. M., K. & T.*, 192 S. W. 121; *Railroad v. Ingram*, 187 S. W. 452, affirmed in 244 U. S. 648; *Gurley v. Railroad*, 104 Mo. 211; *Yarnell v. Railroad*, 113 Mo. 570; *Glasscock v. Dry Goods Co.*, 106 Mo. App. 657; *Patton v. Railroad*, 179 U. S. 658. (c) Proof that a negligent obstruction was upon the master's premises at the time of the injury, does not establish prior knowledge, actual or constructive, on the part of the master even though the injury occurred on the private premises used exclusively by his employees, for knowledge will not be presumed even under such circumstances, as it is an independent element of liability which must be alleged and proved. *M., K. & T. v. Jones*, 103 Tex. 187, 125 S. W. 309; *Ft. Worth Ry. Co. v. Jones*, 166 S. W. 1130; *Ry. Co. v. Jones*, 182 S. W. (Tex. Civ. App.) 1184; *Welch v. Railroad*, 17 N. Y. Supp. 342; *Haggard v. McGrew Coal Co.*, 200 S. W. 1072; *Barrett v.*

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Virginian Ry. Co., 244 Fed. 397; Elliott v. Railroad, 204 Mo. 1; Hollenback v. Railroad, 141 Mo. 109. (d) Prior knowledge to any of the employees of the defendant of the existence of the brake-beam is not sufficient. Knowledge of a defect in a railroad yard must be brought home to some agent or employee charged with removing and remedying the defects. (4) Thompson on Negligence, sec. 3797, p. 78; 1 Bailey on Personal Injuries (2 Ed.), sec. 282, p. 588; Covey v. Railroad Co., 86 Mo. 641; Porter v. Railroad Co., 71 Mo. 78; Johnson v. Railroad, 96 Mo. 340; Dedrick v. Railroad, 21 Mo. App. 433. And the enactment of a statute prescribing that an employee does not assume the risk of the negligence of a fellow servant, does not alter the rule or repeal this principle. See Mr. LaBatt's comprehensive note in 41 L. R. A. 1, and particularly on p. 143 thereon. (e) The preponderance of the evidence in this case against the plaintiff's uncorroborated statement that there was a brake beam near the 21 lead, is so strong as to compel the presumption that the jury was actuated by prejudice, bias or sympathy. Under such circumstances this court will not hesitate to set aside the verdict of the jury. Lehnick v. Met. St. Ry. Co., 118 Mo. App. 611; Gage v. Trawick, 94 Mo. App. 307; Friesz v. Fallon, 24 Mo. App. 439; Holt v. Morton, 53 Mo. App. 187; Hewitt v. Doherty, 25 Mo. App. 326; Lionberger v. Pohlman, 16 Mo. App. 392; Walton v. Ry. Co., 49 Mo. App. 620; Empey v. Grand Ave. Cable Co., 45 Mo. App. 422. (2) Instruction No. 6 on the measure of damages is erroneous for the reason that it does not conform to the present value theory adopted by the Federal Supreme Court. Railroad v. Kelly, 241 U. S. 485.

*A. G. Knight* for respondent.

(1) By Section 1 of the Federal Employers' Liability Act (U. S. Comp. Stat. 1901, Supp. 1911, p. 1322) every railroad company is made liable for the negligence of any of its officers, agents or employees and their neg-

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ligence is the company's negligence, and their act in leaving the brake-beam at the point where it was shown to be left was a negligent act the moment they did so, binding the company as effectually as if the company itself had left the brake-beam there, and the plaintiff was not bound to assume a further burden not embodied in the statute or required by its terms, *i. e.* to show a negligent remaining of the brake-beam at the point where left. *Hawkins v. Railroad Co.*, 189 Mo. App. 224; *Cross v. Railroad Co.*, 191 Mo. App. 202; *Laughlin v. Ry. Co.*, 205 S. W. 3. (a) The direct and circumstantial evidence was ample to support the finding of the jury that an employee of the company left the brake-beam at the point of injury. (b) The advancing legislation of recent years, extending the liabilities of the master for injuries to the servant, not only of this and other states, but of the Congress, and especially the act upon which this suit is founded, abolishing the fellow-servant rule, denying the defense of contributory negligence and modifying the doctrine of assumption of risk, has practically swept away all the objections to the doctrine as a distinctive rule of evidence of *res ipsa loquitur*, as applicable to master and servant. Most of the objections to the applicability of this rule to that situation have now no predicate on which to rest, and with the breaking down of these barriers, the rule must unfold with the spirit of the law. While we think the facts and circumstances are ample and abundant to impel the inference of defendant's negligence in this case, yet if they are lacking in the least degree in force or probativeness, this rule of evidence will at least lend *aid* to the conclusion of negligence, and it may be would entirely support it if necessity required. *Jones v. Ry. Co.*, 178 Mo. 528; *Turner v. Harr*, 114 Mo. 335; *Blanton v. Dold*, 109 Mo. 64; *Sackewitz v. Am. Biscuit Mfg. Co.*, 78 Mo. App. 144; *Johnson v. Met. St. Ry. Co.*, 104 Mo. App. 588; *Klebe v. Parker Distilling Co.*, 207 Mo. 480; *Benedict v. Ry. Co.*, 104 Mo.

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App. 218; Mo. Pac. Ry. Co. v. Larussi, 161 Fed. 70; Wanen v. Mo. & Kans. Tel. Co., 196 Mo. App. 553; Myers v. City of Independence, 189 S. W. 821; Orris v. Railway Co., 214 S. W. 127; 4 Wigmore, Ev. p. 3557; Wiles v. Railroad Co., 125 Minn. 348, 147 N. W. 427; Graham v. Badger, 164 Mass. 42; Lykiardopoulo v. New Orleans C. R. L. & P. Co., 127 La. 310, 53 So. 575, Ann. Cas. 1912A, p. 976; Trim v. Ship Bldg. Co., 211 Mass. 592; Nolen v. Engstrum Co., 166 Pac. 346; Duhme v. Hamburg-American Packet Co., 184 N. Y. 404, 112 Am. St. 615; Removich v. Const. Co., 264 Mo. 43, L. R. A. 1917E, p. 233; Note L. R. A. 1917E, pp. 4 to 126.

WALKER, C. J.—This is an action predicated on the Federal Employers' Liability Act, for personal injuries. It was brought by the respondent against the appellant in the Circuit Court of Linn County, where it was tried in March, 1916, resulting in a verdict in favor of the respondent in the sum of \$10,000. A review of the judgment rendered thereon is sought by the appellant.

Appellant maintains, at Hannibal, a terminal yard, which has thereon various buildings, a main, transfer and switching tracks, necessary in the operation of its business as a railway company. Respondent at the time of his injury was employed in this yard as a switch-tender, his hours of labor being from seven p. m. to seven a. m. His duties required him to open and throw switches and align them for the passage of trains. In so doing, it became necessary for him at times to pass over the tracks, switches and rails in the yard. He had been thus employed by the appellant for twenty-six days prior to his injury, which occurred December 11, 1915, at about four o'clock in the morning. The weather, at the time was dark and rainy. Just prior to his injury, respondent had aligned a switch for a train which was to pass through the yard *en route* to St. Louis. Immediately thereafter he started to walk toward and across the main lead, giving signals as he went with his lantern, to the train for which he had aligned the switch, to proceed. By the

"main lead" is meant a main track which ran diagonally across the yard from which other tracks radiated to switch and repair parts of the yard. One of these tracks was known as lead to switching tracks No. 21 to No. 25, and is designated in this record as "21 lead." After giving the signals, and while respondent was in the space between the main lead and 21 lead on his way to a shanty in the yards, where he stayed when not engaged in the discharge of his duties, and while looking ahead to determine his course, and to see if the train for which he had aligned the switch was approaching, he stumbled over a brake-beam lying between the main track and 21 lead, and fell to the ground. In falling, he struck on his side and back, and fell lengthwise of the track. As he attempted to arise, a switch engine approaching on the 21 lead knocked him down again, caught him and dragged him about twenty feet, running over and crushing his right hand and wrist. He also received a disfiguring gash over his right eye. Arising after the switch engine had passed, he saw for the first time the brake-beam over which he had fallen in the first instance. The injury he received necessitated the amputation of his right hand, and a portion of the arm, about two or three inches above the wrist; and the gash above his eye resulted in an injury to his sight. His employment in interstate commerce is conceded.

At the time of his injury, he was twenty-three years of age, in a good state of physical health, and was earning two dollars and thirty cents per night. The yard where the injury occurred was the private property of the appellant. It was enclosed with a solid plank fence, which was placarded on the entrance to same with notices forbidding trespassing. Watchmen were kept to enforce this injunction.

Witnesses for appellant testified as to a statement alleged to have been made by the respondent at the yard office immediately after the injury, to the effect that when he was signaling the train he had aligned the switch for, he stepped back out of its way, and was

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struck by the switch engine, knocked down, and in putting his hand on the rail to put himself out of the way, it was run over and crushed.

Various collateral facts and circumstances were adduced in evidence by appellant to sustain the conclusion that its employees had no part in or knowledge of the location of the brake-beam, and that soon after the accident it was not to be found between the tracks.

I. Appellant contends that its demurrer to the evidence should have been sustained, first, because the respondent's statement as to the location of the brake-beam was not corroborated, but was shown by circumstances to be false; and, second, that appellant was

**Constructive Notice.** not shown to have had either actual or constructive notice of the location of the brake-beam, as stated by the respondent. The latter testified affirmatively to the fact of the brake-beam's location, and that it constituted the obstruction which caused his fall in the first instance. It was shown that at different times cars were repaired in the yard, and their parts separated, and that it was customary when such repairs were in progress, to take out brake-beams and drop them near at hand where they could subsequently be removed by a crew thus engaged. That a car was being repaired on a track near the scene of the accident on the day preceding the morning the respondent was hurt. These facts cannot be otherwise construed than as circumstances confirmatory of respondent's testimony, which is not weakened by the fact that he did not know who placed the brake-beam between the tracks or its location there prior to the accident, or how long it had been there, or that it was not seen there the day preceding and immediately following the accident. The assumption, therefore, based upon the circumstances adduced by the appellant to establish, first, that the brake-beam was not where it was stated to have been by the respondent; and, second, that it mysteriously disappeared, do not in our opinion, tend to weaken the force of the latter's testimony. The first attempts by an array of

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circumstances to contradict affirmative testimony; and the second assumes that if the brake-beam was as located by the respondent it mysteriously and unaccountably disappeared. Certainly, it could not have accorded with any rational purpose of the respondent to cause its removal. If it did mysteriously disappear, as contended by appellant, its disappearance could have redounded only to the benefit of the appellant. Other arguments are adduced by appellant upon circumstances of like character to the foregoing, for the purpose of destroying the force of the respondent's testimony. They do not impress us as having a tendency to accomplish this end.

The *quantum* of proof necessary to sustain a verdict in a case of this character may perhaps be more readily determined by the statute upon which the action is based. It is as follows: "That every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason or any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." [Sec. 1, Fed. Employers' Liability Act, U. S. Comp. Stat. 1901, Supp. 1911, p. 1322.]

This section renders every railroad company liable for the negligence of any of its officers, agents or employees, and their negligence is that of the company. The leaving of the brake-beam, therefore, at the point where it was shown to have been left, was a negligent act and bound the company as effectually as if it, as principal, had left it there, and respondent was not required to show a negligent placing of the brake-beam at the point where it was left. [Mondou v. Railroad, 223 U. S. 1, 56 L. Ed. 327; Pedersen v. Railroad, 229 U. S. 146, 57 L. Ed. 1125; Seaboard Airline v. Horton, 223 U. S. 492, 58 L. Ed. 1962.] Thus left, it did not constitute a risk

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normally incident to the employment in which the respondent was engaged, and he had a right to assume that the appellant had exercised proper care with respect to providing a reasonably safe place for him to work, free from any obstacles which would be likely to cause him injury. In other words, as the statute has been construed by the courts, an employee cannot be treated as having assumed a risk until he becomes aware of the defect or obstruction and of the risk arising from it, unless it is so obvious that an ordinarily prudent person under similar circumstances would have observed it. [Seaboard Airline v. Horton, 223 U. S. 492, 58 L. Ed. 1062; Fish v. Railroad, 263 Mo. 106; Young v. Lusk, 268 Mo. l. c. 640; Williams v. Pryor, 272 Mo. l. c. 619.]

The jury, however, heard all of appellant's testimony, as well as that of the respondent, as to the manner in which he was injured, and the location of the brake-beam, and gave credence thereto rather than to the testimony of the witnesses for the appellant. The respondent's testimony being substantial in its nature, and not contrary to reason, we are not inclined to disturb the conclusion reached by the jury in regard thereto. [Laughlin v. K. C. So. Ry., 205 S. W. 3; Hall v. Coal Co., 260 Mo. 365; Stauffer v. St. Ry. Co., 243 Mo. l. c. 316.]

II. Error is assigned in the admission of testimony that it was the practice of appellant's employees to scatter materials over the yard in the repairing of cars. The yard constituted one of the appointments of appellant in the conduct of its business. The manner in which the yard was kept, therefore, was a proper subject of proof. [St. L. Nat. Stockyards v. Godfrey, 198 Ill. l. c. 294; Chicago City Ry. Co. v. Sugar, 117 Ill. App. Rep. 578; Rich v. Pelham Co., 48 N. Y. Supp. 1067; Boyce v. Wilbur Lumber Co., 119 Wis. l. c. 648.]

While proof of such acts of appellant's employees may in a sense be held to be collateral, an inference of fact is authorized to be drawn therefrom bearing upon



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the particular act of negligence which rendered the testimony admissible. [Rose v. St. Louis, 152 Mo. 602; Campbell v. Railroad, 121 Mo. 340; Calcaterra v. Iovaldi, 123 Mo. App. 347 and cases p. 352; Franklin v. Ry. Co., 97 Mo. App. 1. c. 480 and cases; Evans v. Gas. Co., 148 N. Y. 112.] From all of which the general rule is deducible that the competency of a collateral fact in any given case turns on whether or not the court deems its bearing on the main issue to be so intimate and valuable as tending to prove the main fact, when the objections to the testimony as collateral evidence may be disregarded.

**Collateral  
Fact.**

In harmony with the rule as thus announced, it having been affirmatively shown by the testimony of respondent that the brake-beam had been left between the tracks, it was not improper, as corroborative of his testimony, to show that it was the habit of the employees of the appellant to thus leave materials on the yard when repairing cars. Especially is this true when a custom thus sought to be established is shown to have been practiced in this immediate vicinity of the accident, and is limited to proof of the leaving of materials on the yard, similar to that which was the proximate cause of the alleged injury.

III. The giving of instruction numbered 6 is assigned as error. So far as applicable to the contention here made, this instruction told the jury, "that in case they should believe and find from the evidence that the defendant was guilty of negligence contributing to plaintiff's injuries, which must be found by the jury before they can find for the plaintiff at all; and if the jury should further find and believe from the evidence that plaintiff was also guilty of some negligence contributing to his said injuries; that is, if the jury should believe and find that the negligence causing plaintiff's injury, if any, is partly attributable to the defendant and partly to the plaintiff, then the plaintiff is not entitled to recover full damages, but the damages shall be dimin-

**Contributory  
Negligence:  
Damages.**

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ished by the jury proportionately; that is to say, plaintiff in such event would only be entitled to recover the proportional amount of damages sustained by him bearing the same relation to the full amount as the negligence attributable to both defendant and the plaintiff." This is in harmony with the rule as to the measure of damages announced by the Federal Supreme Court (*K. C. So. Ry. v. Jones*, 241 U. S. l. c. 183; *Ill. Cent. R. Co. v. Skaggs*, 240 U. S. 66; *Seaboard Airline v. Tilghman*, 237 U. S. l. c. 501; *Grand Trunk & Western Ry. Co. v. Lindsay*, 233 U. S. l. c. 49; *Norfolk, etc. Ry. v. Earnest*, 229 U. S. l. c. 122); and it has been followed by this court in *Blankenbaker v. St. L., etc. R. Co.*, 187 S. W. 840. There is nothing to the contrary in the case of *C. & O. Ry. Co. v. Kelly*, 241 U. S. 485, cited by appellant. There is, therefore, no merit in this assignment.

IV. The appellant contends tersely, without comment, that "the verdict is excessive." Under the Federal act, the respondent was entitled to such damages as would compensate him for expenses incurred, loss of time, suffering and diminished earning power (*Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59, *Ann. Cas.* 1914(1), 176) and the jury was so instructed.

The act does not restrict the amount of damages recoverable, except as to those actually sustained, and there is no limitation in this respect in our statute. Contributory negligence, the only effect of which would have been to diminish the amount of recovery, was not shown. The evidence adduced in support of the verdict was substantial. While the jury was limited to no exact measure in estimating the damages (*Laughlin v. Railroad*, 275 Mo. l. c. 472) the trial court was vested with a discretion to set aside their verdict if it had been deemed excessive. This was not done, and taking all of the facts into consideration, we are not inclined to rule otherwise.

In the absence of reversible error, the judgment is affirmed. It is so ordered. *Williamson, Goode and Woodson, JJ.*, concur; *Graves, Blair and Williams, JJ.*, dissent.

## CHANIE WILLIAMSON, Appellant, v. UNION ELECTRIC LIGHT and POWER COMPANY.

In Banc, March 15, 1920.

1. **NEGLIGENCE: Safe Place: Narrow and Unlighted Platform.** A petition which states that deceased was ordered and directed to stand twelve feet above a concrete floor on a platform twelve inches wide, and while so standing to reach up six feet and regulate the dampers to a boiler; that the platform was unsafe, because too narrow for deceased to perform his labors with safety, because it had no railing to prevent a person on it from falling off and because it was inadequately lighted; and that, while performing the said work, deceased fell and was killed, states a cause of action. And particularly does the averment that it was dark on the platform tender an issue to be submitted to a jury.
2. ———: ———: **Assumption of Risk.** Although the height and narrow width of the platform on which deceased was required to work were apparent, and although the danger in adjusting the dampers of the boilers which his employment required him to regulate was apparent, he did not assume such risks; but he assumed only such risks, in respect to the place where he was put to work, as were incident to the service after his employer performed his duty by using care to provide a place of reasonable safety. Although the danger may be obvious, if this is due to a lack of care on the part of the master in furnishing him a safe place, the servant does not assume the risk.
3. ———: ———: **Contributory Negligence.** Unless to perform on the platform the work with which the servant was occupied at the time he fell appears conclusively from the allegations to have been plainly hazardous to a degree that would have deterred a man of ordinary prudence from undertaking to perform it, he cannot be defeated on the score of contributory negligence, as a matter of law, upon a demurrer to the petition.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

REVERSED AND REMANDED (*with directions*).

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Williamson v. Light & Power Co.

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*W. R. Hill, Spencer & Donnell and T. F. McDonald*  
for appellant.

(1) The petition clearly alleges a cause of action flowing from a breach of the duty owed by defendant to Williamson, its employee. *Coin v. Lounge Co.*, 222 Mo. 505; *Clark v. Iron and Foundry Co.*, 234 Mo. 449; *Burkard v. Rope Co.*, 217 Mo. 481; *Nash v. Brick Co.*, 109 Mo. App. 606; *Wendler v. House Furnishing Co.*, 165 Mo. 537; *Yost v. Cement Co.*, 191 Mo. App. 431; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 621; *Fisher v. Lead Company*, 156 Mo. 485. (2) The petition does not show facts from which Williamson can be charged with having assumed the risk arising from the condition of his surroundings. *Williams v. Pryor*, 272 Mo. 621; *George v. Railroad*, 225 Mo. 406; *Fish v. Railroad*, 263 Mo. 124; *Yost v. Cement Co.*, 191 Mo. App. 433; *Strother v. Milling Co.*, 261 Mo. 24; *Young v. Lusk*, 268 Mo. 640; *Dakan v. Chase Co.*, 197 Mo. 267; *Jewell v. Bolt and Nut Co.*, 231 Mo. 201; *De Late v. Biscuit Co.*, 213 S. W. 885. (3) The petition does not allege facts which constitute contributory negligence on the part of Williamson, and inasmuch as the law is that, unless the only conclusion that can be drawn from the facts is that there was contributory negligence, the question is for the jury, and the demurrer to the petition should be overruled. *Jewell v. Bolt and Nut Co.*, 231 Mo. 200; *George v. Railroad*, 225 Mo. 411; *Williams v. Pryor*, 272 Mo. 623; *Pauck v. Provision Co.*, 159 Mo. 478; *Yost v. Cement Co.*, 191 Mo. App. 433; *Garaci v. Const. Co.*, 124 Mo. App. 719; *Burkard v. Rope Co.*, 217 Mo. 481; *Wendler v. House Furnishing Co.*, 165 Mo. 537; *Carney v. Brewing Assn.*, 150 Mo. App. 437; *Bowman v. K. C. Elec. Light Co.*, 213 S. W. 161; *Osborne v. Wells*, 211 S. W. 890; *Barnard v. Brick Co.*, 189 Mo. App. 417.

*Jourdan, Rassieur & Pierce* for respondent.

(1) The servant is chargeable with knowledge of all conditions surrounding his employment, and of risks cre-

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ated by these conditions, according as it may reasonably be inferred that those conditions or those risks would have been comprehended by a person of ordinary prudence whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same. 4 Labatt's Master & Servant, sec. 1310, p. 3673; Porter v. Hannibal & St. Joseph Railroad, 71 Mo. 77; Hollenbeck v. Railroad, 141 Mo. 96; McGinnis v. Hydraulic Press Brick Co., 261 Mo. 287. If the risk is such as to be perfectly obvious to the sense of any man, whether master or servant, then even in the case of defective machinery, the servant assumes the risk. Keegan v. Kavanaugh, 62 Mo. 230; Price v. Hannibal & St. Joseph Railroad, 77 Mo. 508; Fugler v. Bothe, 117 Mo. 494; Saller v. Shoe Co., 130 Mo. App. 721; Jones v. Cooperage Co., 134 Mo. App. 330; Pollman v. Car & Foundry Co., 123 Mo. App. 228; DeForest v. Jewitt, 88 N. Y. 264. (2) Plaintiff, as servant of the defendant, was bound to inform himself as to his surroundings, and is held, as a matter of law, to have known and accepted all the risks of the premises which were open and obvious to the sense of any man. (a) This has been applied to overhead dangers, as where a railroad brakeman ran into an overhead bridge, or a driver drove under a low gateway. Devitt v. Railroad, 50 Mo. 302; Baker v. Asphalt Paving Co., 92 Fed. 117; Carroll v. Boston Coal Co., 81 N. E. 296. (b) The same is true as to dangers underfoot, such as risers between a hallway and a room or mud scrapers at the foot of a staircase. Ware v. Evangelical Baptist Assn., 63 N. E. 885; McGinnis v. Brick Co., 261 Mo. 287. (3) An employer is not an insurer against accidents, nor is it chargeable or responsible for not providing against all possible and unanticipated happenings. Glover v. Bolt & Nut Co., 153 Mo. 327; Fugler v. Bothe, 117 Mo. 494; Wendall v. Ry. Co., 100 Mo App. 556; Devitt v. Ry. Co., 50 Mo. 302; Hollenbeck v. Ry. Co., 141 Mo. 97. (4) The mere failure to furnish light does not of itself constitute negligence. Price v. Railroad, 77 Mo. 508; Cleveland Ry. Co. v. Morrey, 88 N. E. 932; 2

Bailey on Personal Injuries (2 Ed.), p. 1197. Nor is the master required to furnish the safest kind of platform that can be devised. He is merely required to exercise ordinary care in furnishing it. The rule in that regard is the same as in furnishing appliances. *Friel v. Citizens Ry. Co.*, 115 Mo. 503. *Shohoney v. Railroad*, 223 Mo. 677; *Steinhauser v. Spraul*, 127 Mo. 562.

GOODE, J.—Demurrers were sustained by the court to three petitions of plaintiff, who stood on the third one, refused to amend and prosecuted this appeal from a final judgment rendered against him. This is the third amended petition, omitting caption and signatures:

“Plaintiff by leave of court first obtained files this her third amended petition and for her cause of action states that she was the lawful wife and now is the widow of Joseph Williamson, deceased, who died in the City of St. Louis, on the 8th day of December, 1914.

“That defendant, Union Electric Light & Power Company, is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Missouri, and engaged in supplying electricity, heat and power in the City of St. Louis, and was also engaged by and through its agents and servants in operating the electric machinery, engines, and steam boilers, and had control over the equipment and appliances used in connection therewith, in the Pierce Building in said city, and by means thereof supplied said building with electricity, heat and hot water service.

“That on all the dates hereinafter mentioned the said Joseph Williamson, deceased, husband of plaintiff, was in the employ of defendant Union Electric Light & Power Company as a fireman in said Pierce Building, and that his duties were to fire and assist in firing the steam boilers in said building and to regulate and assist in regulating the dampers on said boilers.

“That in order to regulate the damper on said boilers said deceased was ordered and required by defendant, its servants and agents to climb up a wooden ladder from

the floor of the boiler-room to a platform twelve feet above the floor, which said platform was twelve feet long and about ten or twelve inches in width and was fastened between two brick columns and against the rear wall of the furnace at the rear end of said boilers, and said deceased was compelled to stand on said narrow platform while regulating said dampers upon said boilers and reach up six feet above said platform in order to regulate and adjust said dampers; that said platform upon which it was necessary for deceased to stand in order to perform his duties was unsafe and dangerous in this, that it was too narrow a space wherein to perform his labors with safety, and that the same was not equipped with a railing.

“Plaintiff further states that it was exceedingly dark upon said platform and at the place where deceased was required to perform his labors and that defendant failed to exercise reasonable care to provide a reasonably safe place on which for plaintiff’s husband to perform his duties, in this, to-wit, that said defendant negligently failed to put a railing around said platform or to widen the same to a width sufficient so that deceased would have been able to perform his duties thereon with safety, and negligently failed to provide adequate and proper lights on or near said platform.

“Plaintiff further states that said defendant knew, or by the exercise of reasonable care could have known, said platform was an unsafe place for deceased on which to perform his labors.

“Plaintiff further states that on, to-wit, the 4th day of December, 1914, while deceased was in the performance of his duty and was exercising ordinary care and while regulating said dampers on said boilers, and by reason of the narrow and unsafe platform on which he was compelled to work by defendant, and because of the negligent failure of defendant to properly light said platform and to widen said platform and equip the same with a railing, deceased lost his footing and balance and fell from said platform to the cement floor below, injuring himself and

fracturing his skull, and died as a result of said injuries on, to-wit, the 8th day of December, 1914.

"Plaintiff further states that she was wholly dependent upon the deceased for support and that his earning capacity was \$—— per month, and that by reason of the negligence of the defendant aforesaid, she has been damaged in the sum of ten thousand dollars.

"Wherefore plaintiff prays judgment in the sum of ten thousand dollars, together with her costs in this behalf expended."

The alleged negligence of the defendant consisted in ordering and requiring deceased to stand twelve feet above the floor of the engine room of the Pierce Building, on a platform ten or twelve inches in width, and in that place regulate the dampers of the boilers by reaching six feet above the platform. This board or platform is alleged to have been unsafe because too narrow for deceased to perform his labors on with safety, and because it was inadequately lighted, and had no railing to prevent a person on it from falling off. We have concluded these averments, particularly the one that it was dark on the platform, tendered an issue to be answered and submitted to a jury, as to whether defendant fulfilled its duty as employer to use ordinary care to furnish its employee, the deceased, a reasonably safe place in which to perform his task of adjusting the dampers of the boiler.

Defendant asserts that the deceased assumed the risk of injury from working on the platform, because its height and dimensions were apparent, and whatever danger there was in adjusting the dampers while standing on it, was apparent, too. That the deceased assumed the risk, under those conditions, especially if they existed when deceased took his job, probably is the law in most jurisdictions. [1 Shear. & Redf. Negligence (6 Ed.), secs. 207e et seq., original Sec. 185, and cited cases.] It is not in this one. The doctrine of this court is that an employee only assumes such risks, in respect of the place where he is put to work, as are incident to the service after the employer has performed his duty by using care to provide a place



of reasonable safety. And although the danger of the place may be obvious, if this is due to lack of care on the part of the master to furnish a safe place, the servant does not assume the risk. Adjudications to the contrary may be found; but for a long time the rule of decision of the courts of this State on the subject has been as stated. [Williams v. Pryor, 272 Mo. 613, 621; Fish v. Railroad, 263 Mo. 106, 112; Curtis v. McNair, 173 Mo. 270.] Many other cases of the same character might be cited.

Neither can we accept the proposition that the deceased so obviously contributed by his own negligence to cause his death, that he should be ruled to have done so as a matter of law. Unless to perform on the platform the work he was occupied with when he fell, appears conclusively from the allegations to have been plainly hazardous to a degree that would have deterred a man of ordinary prudence from the task, the deceased cannot be defeated on the score of contributory negligence. [Williams v. Pryor, 272 Mo. l. c. 623; George v. Railroad, 225 Mo. l. c. 411; Jewell v. Bolt & Nut Co., 231 Mo. 201.] We are speaking now of the facts as shown in the petition. Of course on a trial it may be proved that the negligent way in which the deceased moved about the platform, or some other careless act of his, contributed to cause him to fall. The averments of the petition fall short of convicting the deceased of negligence beyond an inference to the contrary. Decisions on the subject are reviewed in Jewell v. Bolt & Nut Co., supra.

The judgment is reversed and the cause remanded, with directions to set aside the judgment and the order sustaining the demurrer and permit the defendant to answer, if so advised. All concur.

## W. M. BROOKS, Appellant, v. T. A. ROBERTS et al.

In Banc, March 15, 1920.

1. **LACHES: Action at Law: Suit to Quiet Title.** Laches is no defense to an action at law. Where the petition and answer are not set out, but abstracted by appellant, and it is stated in this abstract that laches was interposed by the answer as a defense, but both this abstract and the statement of respondent also say that the petition was an ordinary action under the statute to quiet title, and the record shows the case was tried as one at law, the case will be so treated on appeal, and the finding of the judge sitting as a jury will be binding, for such a petition states a cause of action at law, and not in equity.
2. ———: ———: ———: **Taxes.** The mere non-payment of taxes on land does not show laches.
3. **IDENTITY OF NAME: Identity of Person.** Identity of person is to be presumed from identity of name. But the presumption may be overcome by credible evidence. The presumption only establishes a prima-facie case. The jury, or the court sitting as a jury, may believe or disbelieve such evidence; if believed, the presumption fails; if disbelieved, the presumption will authorize a verdict.
4. ———: ———: **Instruction: Reasonable Doubt.** An instruction on the presumption of identity of person arising from identity of name should not require the trier of the facts to find the identity of person beyond a reasonable doubt, or otherwise ignore the presumption. The term "reasonable doubt" or similar expressions have no place in instructions in a civil case.
5. **INSTRUCTION: Erroneous: Given by Court to Itself.** An erroneous instruction given by the court sitting as a jury to try the facts will work a reversal. In such case, the erroneous instruction in a law case is just as fatal as if the issues had been submitted to a jury and such instruction had been given to them as their guide.
6. **CONVEYANCE: Existence of Deed: Presumption: Payment of Taxes.** In the absence of any record, proof that a deed was made by the patentee to defendant's ancestor may be made either (1) by proof of such facts as will raise a presumption that such deed was made or (2) by direct evidence that such deed was made and

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had been lost or destroyed. But the presumption that a deed was made cannot arise from the mere payment of taxes for a period of years, either by such ancestor or his heirs or grantees; but ancient and long possession, coupled with other circumstances, will justify the presumption. Nor will evidence that defendant's ancestor was in possession of a patent, in which he was not named as patentee, aid the presumption that a deed was made by said patentee to him as grantee. And the presumption aside, and no record of a deed or possession of the land being shown, the evidence should show a deed in fact.

Appeal from Reynolds Circuit Court.—*Hon. E. M. Dearing*, Judge.

REVERSED AND REMANDED.

*Arthur T. Brewster* and *Sam M. Brewster* for appellant.

(1) It was the duty of the court to render judgment in an action under Section 2535 for the party showing the better title. The defendants showing no title and the plaintiff making a prima-facie showing, should have had judgment. *Toler v. Edwards*, 249 Mo. 161; *Maynor v. Land & Timber Co.*, 236 Mo. 728; *Gage v. Cantwell*, 191 Mo. 706; *Grant v. Holliday-Klotz Co.*, 189 Mo. 332; *Dixon v. Hunter*, 204 Mo. 390. (2) Identity of name is identity of person prima-facie. *Geer v. Lumber & Mining Co.*, 134 Mo. 95; *State v. Moore*, 61 Mo. 279; *Gitt v. Watson*, 18 Mo. 276; *Hoyt v. Davis*, 21 Mo. App. 235; *Jackson v. Goes*, 13 Johns. (N. Y.) 518; *Jackson v. King*, 5 Cow. (N. Y.) 237. (3) The presumption of a grant is indulged only in favor of an ancient and uninterrupted possession; and, since it is admitted in this case that the land is wild and uncultivated timber land, there can be no presumption that the patentee and his wife executed a deed to Ward under whom defendants claim. *Dessau-nier v. Murphy*, 27 Mo. 51; *Brown v. Oldham*, 123 Mo. 631; *Glasgow v. Mo. Car & F. Co.*, 229 Mo. 591, 597; *Jackson ex dem. v. Blanshan*, 3 Johns (N. Y.) 296; *Fletcher v. Fuller*, 120 U. S. 534; *Elliott on Evidence*,

sec. 1332; *White v. Loring*, 24 Pick. 319; *Wigmore on Evidence*, secs. 2522, 2515; 1 *Jones on Evidence*, secs. 75, 76, 76A, and 77.

*R. I. January for respondents.*

(1) No one has a right to require another to come into court and show his title who cannot himself show, at least, a prima-facie title. If defendants' proof goes no further than to show that plaintiff's claim is invalid, it is no concern of plaintiff to know whether or not defendants' title is good. *Wheeler v. Reynolds Land Co.*, 193 Mo. 291; *Senter v. Lumber Co.*, 255 Mo. 601; *Skillman v. Clardy*, 256 Mo. 323. (2) The facts and circumstances offered in evidence by the defendants, that their father, Martin F. Brigham, had claimed to own the land since 1860; that he had in his possession the patent therefor, with a bundle of deeds, which he said were the title papers for the land; that the patent was issued to John Conner, as entryman; that this patent and the deed from Howard Ward to George E. Young, under whom Martin F. Brigham claimed title, after the destruction of the deed records in 1872, were both on the same day, to-wit, May 20, 1887, refiled for record and recorded in the recorder's office of Reynolds County; that the deed from Ward to Young, was dated in 1859 and first recorded in 1860; that the deed records were destroyed in 1872; that Brigham continued to pay the taxes from 1860 to his death in 1897; that since his death all the original deeds have been lost or destroyed; that John Conner, the patentee, nor any of his heirs, for more than sixty years, have ever set up any claim to the land, would be such circumstances as to lead any court or any person to presume and believe that John Conner, the patentee, prior to the date of the deed from Ward to Young, had executed and delivered a deed to said Ward, which, with the record thereof, had been destroyed with the other deeds Martin F. Brigham had. *Glasgow v. Mo. Car & Foundry Co.*, 229 Mo. 596; *Greenleaf on Ev.* sec. 17;

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Dessaunier v. Murphy, 22 Mo. 95; Brinley v. Forsythe, 69 Mo. 185; Williams v. Mitchell, 112 Mo. 300; Brown v. Oldham, 123 Mo. 631. (3) Title to real estate and the execution and delivery of deeds, like any other fact, may be established by circumstantial evidence, and it is not necessary that the evidence should remove all reasonable doubt—a preponderance of the evidence is sufficient. Brewer v. Cochran, 99 S. W. (Tex.) 1033; Glasgow v. Mo. Car & Foundry Co., 229 Mo. 600. (4) It is not necessary that the party claiming the land should be in the actual possession thereof before a court or jury would have the right to presume, from evidence and circumstances, the execution of a deed. Glasgow v. Mo. Car & Foundry Co., 229 Mo. 596. (5) The presumption of identity of persons from identity of name, may be shaken and overcome by the very slightest proof of facts which produce a doubt of identity. Keyes v. Monroe, 226 Mo. 121; 2 Chamberlayne on Mod. Law of Ev. sec. 1191.

GRAVES, J.—Action to quiet title. Neither petition nor answer is set out in the record, but the appellant states their contents in his abstract and there is no counter abstract. For the character of the pleadings we must abide appellant's outline thereof, which reads:

“The petition is in the ordinary form under Section 2535, Revised Statutes 1909, alleging that the plaintiff owns said land, that each of the defendants claim an interest therein, either fee simple or otherwise, and praying the court to try, ascertain and determine the estate, title or interest of the parties thereto. Defendants, Ellen M. Cook and Emma E. Brigham, filed answer claiming said land, and alleging that the patentee, John Conner, conveyed said land to Howard Ward in 1859, and said deed and the record thereof has been destroyed by fire; that the Conner heirs under whom plaintiff claims title are not heirs of the John Conner who entered said land; and alleging that they and their ancestor, Martin F. Brigham, have been in the constructive possession of said land since 1859, having paid

taxes and exercised ownership over the same for all that time, and that John Conner and his heirs have been guilty of gross laches and should be now barred from maintaining any claim.

"This case was tried before the Circuit Court of Reynolds County, Missouri, on the 27th day of May, 1914, resulting in a judgment in favor of "John Conner, the entryman," from which said judgment both plaintiff and defendants perfected their appeal to this court and said judgment was by this court on June 1, 1917, reversed and remanded to the Circuit Court of Reynolds County (No. 18566; 195 S. W. 1019).

"The case was thereupon tried at the May term, 1918, of the Reynolds County Circuit Court, and at the conclusion thereof was continued by the court until the next term of said court.

"On the 26th day of November, 1918, at the regular November term, 1918, of the Reynolds County Circuit Court, judgment was rendered by the court quieting title in the defendants Ellen M. Cook and Emma E. Brigham to the land sued for, and decreeing that plaintiff has no right, title or interest whatever therein. A certified copy of which judgment is on file in this court."

For the plaintiff the evidence shows: (1) a patent from the U. S. Government to one John Conner of St. Louis County, Missouri, of date of September 1, 1859, which was recorded in Reynolds County, Missouri, May 20, 1887; (2) quit claim deeds from the widow and heirs at law of one John Conner, who died at Metropolis, Illinois, October 7, 1901; (3) the testimony of Ester V. Conner, the widow of the said John Conner, who died at Metropolis, Illinois. This witness testified in substance, that she and John Conner were married in Canton, Iowa, October 15, 1856; that two days after their marriage they moved to Quincy, Illinois, and lived there about three years or a little less; that from there they moved to St. Louis, and lived there five or six years, and then moved to Cincinnati, Ohio, where they remained three years; that from thence they moved

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back to St. Louis, and removed from St. Louis to Metropolis in 1868 or 1869; that whilst her husband was in St. Louis he was steward on a steamboat from St. Louis to New Orleans; that she heard her husband say that lands were cheap in Missouri and that he thought he would buy some; that she never signed any deed to lands in Reynolds County; that she never saw any patent to lands in Missouri, nor did she know of him owning the lands in suit until she saw an advertisement in a St. Louis paper, a short time before this suit; that her husband never kept her informed of his business; that she never knew or heard of Howard Ward of St. Paul, Minnesota, and had she signed a deed prior to 1860 she thought she would remember it; that in 1900 they had a fire and Mr. Conner's papers were all burned; that she was 72 years old and might be in error as to exact dates, and the time that they lived in Quincy, Illinois.

The defendant offered in evidence the same patent. They then offered a quit claim deed from Howard Ward and wife, to George Young, dated August 23, 1859 (seven days prior to patent to Conner), which deed was acknowledged in Ramsey County, Minnesota, and filed for record in Reynolds County, Missouri, May 7, 1860, and again filed for record May 20, 1887, the same day the patent was filed. From Ward to defendants was shown a paper title. To bridge the missing link, and as tending to show facts, which would justify the presumption or a conclusion that Ward had a deed from the patentee, John Conner, the defendants offered oral testimony of parties living in Boston, Massachusetts, and with this the testimony of Ellen M. Cook, defendant. This testimony (depositions in the case) tends to show: (1) that Martin F. Brigham died in Boston, October 17, 1897, testate, leaving as his children, Francis H. Brigham, Ellen M. Cook, and Emma E. Brigham; that at his death Martin F. Brigham had in his possession title deeds to the land in question, including the patent; that they saw the patent from the United States to

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John Conner, and that it was signed by President Buchanan, Mrs. Cook says that after the death of her father she saw the title papers aforesaid at the home of Martin F. Brigham, sometime between 1872 and 1875, and at that time again noticed the patent; that in 1904 her brother Francis H. Brigham deeded his interest to her; the evidence also shows that these title papers were put into the possession of Thos. D. Cook, husband of Ellen M. Cook, where they were seen by some of the witnesses, but that there was a fire in the office of Thos. D. Cook, when some of his papers were destroyed, and such title papers have not been seen since. It thus appears that both sides had convenient fires. Conner lost all his papers in a fire and Cook a part of his documents.

Defendant also put in evidence the application of John Conner of St. Louis County to enter the land in question, the date of which is stated to be October 11, 1858. Directories of the City of St. Louis from 1848 to 1867 were also put in evidence, except there is none for the year 1858. The one for 1859 shows the name of John Conner, with his avocation given as a laborer. The one for 1860 shows two men by the name of John Conner, both laborers by avocation. The directory of 1864 shows three men with the name, one as laborer, one as a stone cutter, and one with no avocation stated.

Defendant showed that taxes on this land were paid by Martin F. Brigham for the years of 1897 to 1901, inclusive, and by his estate for 1903 and 1908, and by Emma E. Brigham, one of the defendants, for 1904, 1905, 1906, 1907, 1909, 1910 and 1911. Tax books in evidence showed that Martin F. Brigham had paid taxes for 1886, 1892, 1893, 1894, 1895 and 1896, and it is stated that for some years the books failed to show by whom taxes were paid. Other details will be left to the opinion, under proper assignments of error. Trial was had before the court, and judgment for defendants, and plaintiff has appealed.



I. Whilst the abstract of the answer says that laches was interposed as a defense, both this abstract and the statement of counsel for the defendants say that the petition is an ordinary petition under Section 2535, Revised Statutes 1909. Such a petition would state a cause of action at law, and not in equity. To an action at law laches is no defense. [Kellogg v. Moore, 271 Mo. l. c. 193.]

The parties seem to have so treated it at the trial, as they introduced no evidence, except the failure to pay taxes by plaintiff and his predecessors in title. It cannot be said that this evidence was introduced for that purpose, but rather to show defendant's claim of title, and plaintiff's non-claim of title. And the mere non-payment of taxes on land would not show laches. The record shows that the case was tried as one at law, and it is such in fact. Each side asked instructions, although the case was tried by the court, without the intervention of the jury. In such case the finding of the trial court is binding here, and if such court has not improperly instructed himself (acting as the jury) the judgment will have to be affirmed. Of the instructions next.

II. In a law case tried before the court, we can but judge the views of the court by the instructions given. In this case, the fourth instruction for defendants reads:

"The court declares the law to be that while identity of name is prima-facie identity of person, it may be shaken by the slightest proof of facts which produce a doubt of identity; and if the court believes and finds from the evidence in this case that there is a reasonable doubt of the John Conner under whom plaintiffs claims title, being the John Conner who entered the land here in suit, then the prima-facie case of identity of person is overcome and the identity of person must be proven like any other fact, and if the court believes and finds from the evidence in this case that there is proof of facts and circumstances to produce a doubt in the mind of the court that the John Conner

under whom plaintiff claims title is not the John Conner who entered the land here in litigation, then the mere fact that the ancestor of the grantors of plaintiff was of the same name of the entryman of the land, without other proof of identity, is not sufficient to establish title to the land in plaintiff."

This instruction was objected to by the plaintiff, and exception duly saved to the action of the court in giving it. The giving of it, and other instructions, is assigned as error here.

The plaintiff had deeds from the widow and heirs at law of a John Conner, whom he shows to have lived in St. Louis County (for at that time there had been no separation of the city from the county) at the time John Conner of St. Louis County entered and got a patent to the land in dispute. The patent was in evidence. The defenses were (1) that these parties deeding to plaintiff were not the widow and heirs at law of the patentee, and (2) that the patentee had conveyed to Ward. Identity of name raises the presumption of identity of person without further showing. This presumption may be rebutted by evidence, and the presumption weakened, but the question of identity remains as one for the jury to determine. [Flournoy v. Warden, 17 Mo. l. c. 439 et seq.] The fact that there were other John Conners in St. Louis County may weaken the presumption, but will not destroy it. [Flournoy v. Warden, *supra*; Rupert v. Penner, 17 L. R. A. (Neb.) p. 824, note.] The introduction of the patent to John Conner, and the introduction of the deeds from the widow and heirs at law of John Conner, with the proof of the relationship, made a *prima-facie* case for the plaintiff, because of the doctrine that identity of person will be presumed from identity of name. Defendants could and did offer evidence tending to rebut this presumption, but this made a case for the determination of the trier of the facts under the usual rule of burden of proof and preponderance of evidence. The instruction which we have quoted goes further. This instruction required the trier

Identity of  
Name.

of the facts to find the identity of person beyond a reasonable doubt, or otherwise ignore the presumption. The instruction amounts to that, because it says "and if the court believes and finds from the evidence in this case that there is a reasonable doubt of the John Conner under whom plaintiff claims title being the John Conner who entered the land here in suit, then the prima-facie case of identity of person is overcome."

As a trier of the facts the court could take the presumption of identity of person from the identity of name, and all the evidence upon the question of identity of person, and from it all determine the question of identity of person, but he should not have viewed the case from an angle fixed for him by this declaration of law. When once the prima-facie case of identity of person was made by the plaintiff, then the credibility of the evidence against it was for the trier of the facts. The court as the trier of the facts could believe or disbelieve such testimony. If he believed it, he would find for defendants. If he disbelieved it, the presumption of identity would authorize a verdict for plaintiff. [Gannon v. Gas Co., 145 Mo. l. c. 514; Quisenberry v. Stewart, 219 S. W. 625.]

Where the court instructs himself as the trier of the facts, an erroneous instruction is just as fatal as if a jury were trying the facts, and the court had given the same instruction. The identity of the person in this case should have been submitted to the trier of the facts under the ordinary and usual instructions as to burden of proof and preponderance of evidence. For this error the case will have to be reversed.

This presumption of identity of person from identity of name was a link in the chain of plaintiff's proof. The weight of this presumption, as well as the weight of plaintiff's other proof was to be weighed by the trier of the facts in the light of all the facts in the case. And as said, the trier of the fact might have disbelieved all of the evidence tending to controvert the presumption of identity of person, in which case the presumption would

authorize a verdict for plaintiff. Nor does the term "reasonable doubt" or similar expressions have any place in civil case instructions.

For this error we reverse and remand this cause, but as the case has been twice here, and there are other questions raised, we think we should (to the end that there may be an end to this litigation) pass upon them as advisory to the court *nisi* upon a retrial.

III. Defendants' answer pleads that there was a deed from the patentee to Ward. This may be proved in two ways, (1) either by proof of such facts as will raise the presumption of such deed having been made, **Existence of Deed.** or (2) by direct evidence that such deed was made and had been lost or destroyed. We discuss these separately.

Going to the first question. There are no facts to justify the presumption of a deed from the patentee to Ward. The only fact is the payment of taxes by the subsequent grantees of Ward. It would be a novel doctrine to hold that by the mere payment of taxes for a period of years a conveyance would be presumed. Ancient and long possession, when coupled with other circumstances, will justify the presumption of a deed, but in this case there was no ancient or long possession. The admission in the record is to the contrary. There are therefore no facts upon which to predicate the presumption of a deed. [Brown v. Oldham, 123 Mo. l. c. 631; Glasgow v. Mo. Car & Foundry Co., 229 Mo. l. c. 585; Dessanier v. Murphy, 27 Mo. l. c. 51.] We make this ruling in view of certain other declarations of law given by the court in behalf of the defendant.

We shall not pass upon the sufficiency of the evidence to show, as a fact, that there ever was a deed from the patentee John Conner to Ward. The evidence goes largely toward showing that Ward's subsequent grantees were in possession of the patent, rather than to the fact that there was a deed from John Conner to Ward. Up-

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on a new trial this matter can be duly weighed by the trier of the facts. Especially is this true where the matter of a presumption of a deed is eliminated by the fact of there being no ancient, long and continued possession. The evidence should show a deed in fact, and if defendants, upon retrial, fail to show such, then defendants' title fails. It is useless perhaps to add, but we do add, that the facts as to whether or not there ever was (as a fact) a deed from Conner, patentee, to Ward, must be considered under the time-worn rules as to burden of proof and preponderance of the evidence. The defendants aver such a deed. Upon them is the burden of showing that fact, and as we have ruled, exclusive of any presumption of a deed. Whether their evidence will show a deed, the trier of the facts will determine, provided there is sufficient evidence to take that issue to the trier of the facts.

We need not go further. For the error suggested herein the judgment is reversed, and the cause remanded. All concur.

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CAROLINE J. PEPER, Appellant, v. ST. LOUIS UNION TRUST COMPANY, Trustee Under Will of ADOLPHUS S. PEPER; MADELINE PEPER et al.; and MERCANTILE TRUST COMPANY and NICHOLAS M. BELL, Trustees Under Will of MARGARET P. BELL.

In Banc, March 15, 1920.

1. **LIMITATIONS: Cotenants: Notice of Adverse Claim.** The institution of suit against the other descendants of an intestate decedent, by one of his children, in possession, to quiet title in her, is notice to them that an adverse possession is intended to be asserted against them.
2. —: **Arresting Running of Statute: No Action by Defendants Within Ten Years After Suit Brought.** Decedent had built a

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house and placed his daughter, the plaintiff, in possession, and she alleges it was a gift to her. He died intestate in 1903, and on January 27, 1904, she, being in possession, instituted suit against his other heirs, to have the title determined under the statute (Sec. 650, R. S. 1899); and on February 25, 1916, she filed her fourth amended petition, in which she averred that the property was given to her by her father, and that prior to his death she occupied the same and has since held the sole and exclusive possession thereof, "claiming the same as the owner and adverse to all persons whomsoever." To this petition defendants filed their answer in which they each claim an interest in the property adverse to the claim of plaintiff, ask the court to determine the title, charge plaintiff with rents and decree partition; and their first answer, filed June 5, 1907, was to the same effect. *Held*, that, under Section 1879, Revised Statutes 1909, which provides that "no action for the recovery of lands or of the possession thereof shall be commenced or maintained, unless it appear that the plaintiff or other person under whom plaintiff claims was seized or possessed within ten years before the commencement of said action," defendants are barred and plaintiff has title by limitations, unless, within ten years after plaintiff entered into possession, defendants arrested the running of the statute by the filing of their answers, for plaintiff's first petition, in which she asserted sole ownership, imparted notice to them, as cotenants with her, that she claimed adversely to them; and all of defendants' answers or cross-bills being statutory actions to determine title, for rent and for partition, none of them had for their object the recovery of the premises, and none of them operated to arrest the running of the statute, and therefore plaintiff has the title by limitations. (GOODE, GRAVES and WOODSON, JJ., dissenting.)

3. ———: ———: ———: **By Demand for Rents.** A demand for rents set up in the answer to plaintiff's petition to determine title and asserting adverse possession, does not state an action for the recovery of the premises.
4. ———: ———: ———: **By Action to Quiet Title.** That portion of an answer or cross-bill which asks that the court ascertain and determine the title under the statute cannot be considered an action to recover land, such as is contemplated by Section 1879, Revised Statutes 1909, which says that no action to recover land or the possession thereof shall be commenced or maintained, unless it appear that plaintiff or other person under whom he claims was seized or possessed within ten years. The ten-year Statute of Limitations has no application to the bringing of a mere statutory action to determine title.

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5. ———: ———: ———: **By Demand for Partition.** A suit in partition is not an action for the recovery of land, under the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); and a count praying for a decree of partition, in a cross-bill in a suit to determine title, which in no wise asserts a possessory right of the defendants, cannot be considered an action to recover the land or its possession.
6. ———: ———: ———: **By Count in Ejectment.** By a separate count in ejectment in their answer or cross-bill to plaintiff's petition to determine title, or by any other sufficient allegations of facts for affirmative relief, in which they plead ouster, assert their right to possession and pray that they be restored to possession, made within ten years, defendants can arrest the running of the ten-year Statute of Limitations (Sec. 1879, R. S. 1909): but if no such possessory right is asserted in the answer or cross-bill, and it contains no denial of plaintiff's allegation, in her amended petition, of adverse and sole possession and claim of ownership for ten years, including the years which have expired since her suit was instituted, and the facts establish such possession in her, the running of the statute against defendants is not arrested.
7. ———: **Adverse Possession: Creates Title.** Adverse possession, accompanied by the well-known prerequisites, for the statutory period, not only bars any action for recovery, but operates to vest the full legal title in the possessor.
8. ———: ———: **Consistent With Action to Determine Title.** An action to determine title is not only not inconsistent with, but is entirely consistent with, plaintiff's adverse possession.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

REVERSED AND REMANDED (*with directions*).

*Jones, Hocker, Sullivan & Angert* for appellant;  
*James C. Jones, Jr.*, of counsel.

(1) The contract between the plaintiff and her father for the conveyance of this property to her was supported by an adequate consideration. *Rumbold v. Parr*, 51 Mo. 598; *Gupton v. Gupton*, 47 Mo. 37; *Halsa v. Halsa*, 8 Mo. 303; *Sutton v. Hayden*, 62 Mo. 101; *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo.

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530; *Williams v. Jensen*, 75 Mo. 685; *Brannock v. Ma-  
goon*, 141 Mo. App. 320; *Welch v. Whelpy*, 62 Mich. 15;  
*Lamb v. Henman*, 46 Mich. 112; *Soper v. Galloway*, 129  
Iowa, 145, 105 N. W. 399; *Brown v. Sutton*, 129 U. S.  
238. The contract relied upon has been executed and  
the insufficiency or inadequacy of the consideration is  
no defense to a right or interest claimed under an exe-  
cuted contract. *Sooley v. Winter*, 188 Mo. App. 156; *Har-  
rison v. Town*, 17 Mo. 243; *In re Lamb*, 117 N. W. (Iowa)  
1118; *Oregon Ry. v. Forrest*, 28 N. E. (N. Y.) 137;  
*Thomas v. South Haven Ry.*, 138 Mich. 50; *Matt v. John-  
son*, 55 So. (Ala.) 528; *Campbell v. McLaughlin*, 205 S.  
W. 22. (2) Possession of property taken under a verbal  
contract takes said contract without the operation of the  
Statute of Frauds. *Dickerson v. Chrisman*, 28 Mo. 134;  
*Ross v. Alyea*, 197 S. W. 268; *White v. Ingram*, 110  
Mo. 474; *Brown v. Sutton*, 129 U. S. 238; *Neale v. Neale*,  
9 Wall. 1; *Marphet v. Jones*, 1 Swanst. 172; *Clerk v.  
Wright*, 1 Atk. 12; *Pain v. Coombs*, 1 De G. & J. 34;  
*Wilson v. West Hanpool Ry. Co.*, 2 De G. & S. 475;  
*Vugley v. Vugley*, L. R. 4 Ch. Div. 73, affirmed L. R. 5  
Ch. Div. 890; *Blockney v. Ferguson*, 8 Ark. 272; *Ar-  
nold v. Stephenson*, 79 Ind. 126; *Fellon v. Smith*, 84  
Ind. 485; *Robinson v. Throckill*, 110 Ind. 117; *Edwards  
v. Fry*, 9 Kan. 417; *Green v. Richards*, 23 N. J. Eq. 32;  
*Coggsell, etc. Co. v. Coggsell*, 40 Atl. 213; *Calau-  
chini v. Brausleiter*, 84 Cal. 249; *Eaton v. Whitaker*, 18  
Conn. 222, 44 Am. Dec. 586; *Cooney v. Timmons*, 16 S.  
C. 378; *Browne on Statute of Frauds* (5 Ed.), secs.  
467, 487. (3) Continuous and adverse possession for a  
period of over ten years of the property in suit vested in  
plaintiff the legal title thereto in fee simple. *Eckey v.  
Inge*, 87 Mo. 495; *Merchants' Bank v. Evans*, 51 Mo. 347;  
*Kirten v. Bull*, 168 Mo. 633; *Ridgeway v. Holliday*, 59  
Mo. 453; *Sconnell v. American Soda Fountain Co.*, 161  
Mo. 606.



*Leahy & Saunders* for respondents.

(1) There is no evidence under the issues presented by the pleadings to support a decree in favor of plaintiff. Plaintiff's attitude under her amended petition is that of a purchaser for value, and a decree in her favor upon the theory of a gift would necessarily have been outside of the issues of the case and consequently void. *Christian v. Ins. Co.*, 143 Mo. 461; *McNair v. Biddle*, 8 Mo. 257; 3 Ency. Pl. & Pr. 357; *Story's Eq. Pl.* sec. 257; *Flewellen v. Crane*, 58 Ala. 627; *Marsh v. Mitchell*, 26 N. J. Eq. 497. (2) The Statute of Frauds (R. S. 1909, sec. 2781) provides that all estates in lands made or created by parol, and not put in writing and signed by the parties so making or creating the same, shall have the force and effect of leases or estates at will only, and shall not, either in law or in equity, be deemed or taken to have any other or greater force. *Delventhal v. Jones*, 53 Mo. 460. Notwithstanding the letter of the statute, courts of equity will still enforce a parol gift or sale of real estate, where it appears that a refusal to do so would, by reason of the acts of the donee or vendee, as the case may be, upon the faith of such gift or sale, operate as a fraud upon such party (*Rosenwald v. Middlebrook*, 188 Mo. 58). (3) The great weight of authorities, however, is to the effect that delivery of possession alone is not sufficient, but that the donee must further show that, acting upon the faith of the gift, he has in some way changed his position to a substantial detriment so that a refusal to consummate the gift would be a pecuniary loss to him and an act of injustice. *Beach on Contracts*, sec. 701; *Pomeroy on Contract (Spec. Perf.)*, secs. 130-1; *Brown on Stat. Frauds*, secs. 467, 491a; *Thornton on Gifts*, secs. 371-2, 378-9; *Waterman on Spec. Perf.* sec. 271; 20 Cyc. 1200; 14 Am. & Eng. Ency. Law, 1041; *Caldwell v. Williams*, 1 Bailey's Equity (S. C.) 175; *Logue v. Langan*, 81 C. C. A. 271; *Allison v. Burns*, 107 Pa. St. 50; *Seavey v. Drake*, 62 N. H. 395; *Wiley v. Charlton*, 43

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Neb. 840; Neale v. Neale, 9 Wal. 1; Bevington v. Bevington, 110 N. W. (Ia.) 840; Harrison v. Harrison, 36 W. Va. 556; Beall v. Clark, 71 Ga. 818. If the improvements are slight or trivial, not equal to the rental value of the property, no equity is raised in favor of donee. Thornton on Gifts, secs. 378-9; Wack v. Sarber, 2 Whar. (Pa.) 387; Hutchinson v. Chandler, 104 S. W. 434; Thompson v. Ray, 92 Ga. 285; Price v. Lloyd, 86 Pac. 767; Cook v. Erwin, 133 S. W. 897; Sitton v. Shipp, 65 Mo. 297; Brownlee v. Fenwick, 103 Mo. 420, 428; Goodman v. Cowley, 161 Mo. 657, 663; Goodin v. Goodin, 172 Mo. 48; Forester v. Sullivan, 231 Mo. 373; Elzman v. Elzman, 253 Mo. 175; Rodgers v. Wolff, 104 Mo. 9; Emmel v. Hayes, 102 Mo. 194; Hubbard v. Hubbard, 140 Mo. 303; Manning v. Berry, 142 Iowa, 47. (4) Plaintiff has not acquired the legal title in fee-simple to the property by adverse possession. This action was instituted January 27, 1904, and on June 5, 1907, an answer and cross bill was filed on behalf of all defendants, which answer and cross-bill is similar in its nature to the various answers and cross-bills in the present case. That the Statute of Limitations must be affirmatively pleaded is elementary. Rozier v. Griffith, 31 Mo. 171; Real Est. Sav. Inst. v. Colonius, 63 Mo. 290; Woodsworth v. Tanner, 94 Mo. 124; Paris v. Haly, 61 Mo. 453; Holloway v. Holloway, 97 Mo. 628; James v. Gropp, 157 Mo. 420; Barnard v. Keithley, 230 Mo. 223. In all these cases, the principle upon which the court acts is that, when a court of chancery has jurisdiction of the subject-matter and of the parties, it will, in order to prevent multiplicity of suits and circuity of action, administer full and complete relief in the premises. Snyder v. Arn, 187 Mo. 165. The prayer for partition in the cross-bills certainly challenged the adverse claims of plaintiff and, in effect, asserted that the defendants and plaintiff owned the property in question as cotenants, which necessarily negatived the idea that plaintiff was the sole owner of the property. Was not this sufficient to stop the running of the statute? Furthermore, as a practical question, we should

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like to inquire what the defendants ought to have done in this case to stop the running of the statute? They could not ingraft upon the partition statute any peculiar form of action, or change its provisions. Should they have filed a suit for ejectment in order to protect their interests? If so, how could the suit have been maintained when it was admitted that plaintiff was a cotenant and entitled to a share of the property? Should she have been enjoined from prosecuting this suit? Should the court have been asked in the cross-bill to place the defendants bodily in possession of the home and permit them to share it with plaintiff? 2 Wood (4 Ed.), p. 1196, sec. 253a (I); 25 Cyc. 1278, par. H; Norton v. Reed, 253 Mo. 236; Estes v. Nell, 140 Mo. 650; Snell v. Harrison, 131 Mo. 500.

WILLIAMS, J.—This is a suit to determine the title to a parcel of ground with a dwelling house situated thereon known as No. 4448 Washington Boulevard, St. Louis, Missouri. The suit was commenced in the Circuit Court of the City of St. Louis, on January 27, 1904. This is a second appeal in this case. The first appeal was reported in 241 Mo. 261, but none of the points involved in the present appeal were involved in the first appeal. On February 25, 1916, plaintiff filed her fourth amended petition herein upon which the case was tried below. The petition in substance alleges:

First. That she is the owner in equity of the land described in petition: that one Christian Peper in his lifetime had the legal title to said premises, subject to plaintiff's equitable right to set up in the petition; that he died on the — day of September, 1903, leaving as his children and sole heirs at the law this plaintiff, and Adolphus S. Peper, Charles G. Peper, Margaret P. Bell and Frederick C. Peper; that he left a will and testament which were duly probated; that the will contained no specific devise of the property now in controversy, but named the above children and Christian Cornelius, otherwise known as Christian Peper, Jr., as residuary dev-

isees and legatees under his will, and that they thereupon succeeded to the legal title to said premises, subject to plaintiff's equitable claim. That Frederick C. Peper and Christian Peper, Jr., afterwards conveyed their right, title and interest in and to said property to the plaintiff. The answer further alleges the death of some of the children since this suit was instituted and sets forth the names of their respective heirs etc. (all of whom were made defendants herein).

Second. That prior to October, 1898, said Christian Peper promised to buy for plaintiff a lot of ground and to build a residence thereupon and to convey the same to this plaintiff. The petition then alleges the following:

"Plaintiff states that when the said Christian Peper promised, as aforesaid, to purchase for this plaintiff a lot in the City of St. Louis and to build a residence thereon and give said property to the plaintiff, he stated to the plaintiff that if she would select and assist in the selection of a lot in the City of St. Louis for that purpose and would supervise and assist in the supervision of plans and specifications for a dwelling house to be erected thereon, and superintend and assist in the superintendence of the erection of such a dwelling house thereon, and with her family move into said house, when erected, he, the said Christian Peper, would purchase said lot so selected and cause to be erected thereon a house suitable for the plaintiff and her family, and convey the same to the plaintiff, and the plaintiff avers that she agreed to select and assist in the selection of such a lot in the City of St. Louis, supervise and assist in the supervision of the plans and specifications for a dwelling house thereon, superintend and assist in the superintendence of the construction of such a residence, and that when the same was completed, she would move into the same with her family; and the plaintiff alleges that she accordingly selected and assisted in the selection of a suitable lot, which, when so selected by her, was purchased by the said Christian Peper, supervised and assisted in the supervision of the plans and specifications for a residence

thereon; superintended and assisted in the superintendence of the construction of the house on said lot, which the said Christian Peper, caused to be erected thereon, as he had agreed to do, and, upon the completion thereof, moved into the same with her family, *and has ever since resided therein and has held the sole and exclusive possession of the premises above described, claiming the same as owner and adverse to all person whatsoever.*" (Italics ours.)

Third. That the defendants claim an interest in said premises adverse to the title of plaintiff.

The prayer of the petition is that the court adjudge and determine the title of the respective parties in and to said property.

The defendants filed separate answers to the above petition. All of the separate answers contained allegations in substance as follows:

Admit that Christian Peper in his lifetime held a legal title to said property; admit the death of said Peper on September 26, 1903, and the names of the respective heirs as alleged in plaintiff's petition; also admit that Christian Peper left a will which was duly probated and that persons named in plaintiff's petition were also named as residuary devisees and legatees under said will; also admit that they each claim an interest in the premises adverse to the claim of the petitioner.

The answers further allege that plaintiff has occupied the premises since the death of Christian Peper as her residence and that the rental value for the same is \$125 per month, and that no part of the same has been paid except the first, second and third months following the death of Christian Peper.

The answers pray that the court ascertain, determine and adjudge the title and interest of the respective parties in said real estate, and ask judgment against the plaintiff for rent for use and occupation of said premises since the death of said Christian Peper.

Others of the defendants in their separate answers allege that if there was such an agreement as is pleaded

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by plaintiff in her petition the same was not in writing and therefore void under the Statute of Frauds, and some of the separate answers by way of cross-bill ask to have the property partitioned, alleging the interest of the different parties therein as originally arising under the will of Christian Peper, and allege that the property could not be divided in kind and ask that the same be sold and the proceeds thereof distributed according to the respective interests.

By way of reply the plaintiff alleged that in October, 1900, she entered into the actual possession of the premises described in the petition, and has since that time remained in the sole, exclusive, adverse, open and notorious possession of said premises, claiming title thereto in fee; and that by reason thereof the rights of defendants in said premises are barred by the Statute of Limitations.

The evidence upon the part of plaintiff was substantially as follows:

Christian P. Bushman, son of plaintiff, testified as follows:

"My grandfather [Christian Peper] told mother [plaintiff herein] if she would pick out a lot in a location she would live and be satisfied in he would by it and build a house for her and give it to her. . . . Grandfather told mother she would have to get the plans and all. . . . She said she would."

This witness further testified that his mother spent considerable time in looking for a lot, finally selected the one in question, and that Christian Peper purchased the same, paying \$8250, and took the deed in his own name. The deed was dated September 29, 1898. That his grandfather then told an architect he was going to build a house for his daughter and that the architect should consult her about the plans; that his mother made suggestions to the architect as to the plans for the house; that the house cost about thirty-five thousand dollars; that his mother moved into the house in October, 1900, and has had possession of the property ever since.

It further appears from the evidence that during the times above mentioned plaintiff and her husband were not living together and afterwards in 1902 were divorced.

This witness testified that his grandfather told him that he had offered the deed for the property to the plaintiff, but that she would not take it because she was afraid her husband would come back and insist on living with her.

Upon the cross-examination this witness admitted that while this suit was pending he had written a letter to one of the defendants asking for a loan of five hundred dollars in which he said, referring to this suit: "So send me that check or I will not know anything."

Estelle Peper Bushman, daughter of the plaintiff, testified that her mother had occupied the house since October, 1900. This witness further testified as follows:

"He [Christian Peper] told her [plaintiff] if she would select a lot he would put up a house for her and give it to her, and he told her if she wanted to he would buy a house instead of building one; if she found the house already built he would buy that for her." That her mother looked several times for a lot and finally selected the one in question, because it was located at a place which would make it convenient for her grandfather to come there every day for lunch. That her grandfather told plaintiff that he would send an architect out and she could direct him as to the plans; that the plaintiff watched the daily construction of the house, suggesting changes to be made therein; that her grandfather was in the habit of taking lunch with plaintiff and remaining until about two p. m., and later when he became less active in business would sometimes remain until five p. m.; that a short time after the house was completed her grandfather was visiting the family and plaintiff made some complaint about the house having too many windows, and that her grandfather said plaintiff could sell the house and do whatever she wanted to with the proceeds.

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Clarence Peper, another son of plaintiff, testified as follows:

"My grandfather said: 'Carrie [plaintiff], you ought to take that deed,' [they were discussing the deed to the house]. My mother said there was no rush about it and mentioned something about a divorce."

The testimony of several witnesses upon a former trial was read in evidence. That of a Mrs. Doll, a neighborhood friend of the family, to the effect that Christian Peper told her that he thought he would make an end to his daughter moving around, so he bought this lot and built the house and told the daughter that he would build it for her and make her a present of it and that he gave it to the plaintiff because she had nobody "to do for her."

James F. Ballard, who lives adjoining this property, testified that Mr. Peper told him that he built the house and had given it to his daughter (the plaintiff), and that he had also offered to build a house for his other daughter, Mrs. Bell, but that she did not like the location.

Adrain Bassett, the man who did the plumbing work on the house, testified that Christian Peper told him that he wanted a good job, that he was building the house for his daughter and intended to give it to her.

Henry S. Benecke, the man who did the carpenter work on the house, testified that Christian Peper told him he was building the house for the plaintiff. This witness saw the plaintiff at the house several times while it was being constructed and consulted with her about some changes.

William W. Portman, a real estate dealer, testified that Christian Peper told him that he was building this house for plaintiff and referred to it as "Carrie's House."

Harry S. Clymer, chief draughtsman for the architect who planned the house, testified that Christian Peper told him that the house was intended for the plaintiff and that he also intended to build one for Mrs. Bell.



Mrs. Klippel, a friend of the family, testified that Christian Peper told her that he was going to complete the house of "Carrie" and then he was going to look for a lot for his other daughter, Mrs. Bell.

Mrs. Chivington, a seamstress, testified she had done sewing for both Mr. Christian Peper's daughters and knew him during the last ten years of his life and was often at his home and at the home of plaintiff. That she heard Mr. Peper say on one occasion: "Now, Carrie, there is the plan of your new house." She on another occasion heard Mr. Peper say he was building a house for "Carrie," because she had trouble with her husband, and that she heard him ask the plaintiff to go with him to get the deed to the house, but that plaintiff refused, because she had not yet gotten her divorce. During Mr. Peper's last illness he stated to the witness: "Wasn't it too bad that Carrie did not go with me that day to get the deed?" and further said: "Never mind. just as soon as I am well I will give her the deed, and then there can be no dispute as to the ownership of that house." Mr. Peper died within two weeks after making this statement.

Dayton M. Numbers, an acquaintance of Christian Peper, testified that Mr. Peper said that he was going to build this house for plaintiff and give it to her, so that she could have a home of her own, and that after the house was built Christian Peper said: "Carrie's house is finished. You can get a good look at it." And that he further said that he intended to take lunch with "Carrie" and that the house was "as convenient for her as for me: so both of us are satisfied."

Jacob Weisling testified that while he was giving Christian Peper a massage treatment during the time the house was being built he was told by Mr. Peper that he was building the house for his daughter "Carrie," "because she was taking care of him."

Mrs. Carrie Miller Peper (sister-in-law of plaintiff), widow of Charles G. Peper, deceased, testified that Christian Peper was rather feeble physically during the last

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year of his life; that in 1903 while she was at Christian Peper's home she was telling him about making some purchase down town and at that time Mr. Peper said: "That reminds me; I must have the deed drawn and give it to Carrie for the house." This witness, as the sole devisee under the will of Chas. G. Peper, deceased (one of the residuary devisees in the will of Christian Peper), conveyed all her right, title and interest in this property to plaintiff.

Deeds from Fred C. Peper and Cornelius C. Peper and wife conveying to plaintiff all their interest in this property were also introduced.

Plaintiff's daughter was recalled and testified that her grandfather during his lifetime supported her mother and that after his death her mother had paid the taxes on the property and had refused to pay rent on the property. She further said that none of the other children denied that the house belonged to her mother except Mr. and Mrs. Bell, and that they did not deny it until after her grandfather's death.

Upon the part of the defendants the evidence was substantially as follows:

Nicholas M. Bell testified that in 1889 he married Maggie Peper, the daughter of Christian Peper, and afterwards (with the exception of the first nine months) lived at the Peper home until Mr. Peper died; that one day at the Peper home the plaintiff and witness's wife asked him to talk to Mr. Peper about making plaintiff a deed to the property now in controversy. The witness went to see Mr. Peper in that regard.

At another time at the Peper home one of Peper's sons asked the father if he was going to deed this property to the plaintiff and Mr. Peper said that he was not, but that it was his house, and that the house "had cost more money than he had expected—they had taken a' vantage of him in his affliction and had spent more money there than they had a right to spend." At another time this witness heard his wife say, "Papa, ain't you going to give Carrie that house on Washington Avenue?" Mr.

Peper replied: "No, that is my house. They have taken advantage of me in my illness and expended more money than they had a right to do."

This witness testified that the Pepers estate was worth about four million dollars, and that Mr. Peper was feeble physically during the last year of his life; that at the time of the trial the plaintiff was the only surviving child of Captain Peper.

Defendants also offered evidence tending to show that Fred C. Peper, after the death of Christian Peper, paid \$120 per month rent on this place from August, 1903, to April, 1904. This witness testified that the rental value of said premises during the first five years of plaintiff's occupancy was \$1500 to \$1800 a year; during the next five years it was \$1500 per year, and \$1200 per year during the remainder of the time.

In rebuttal plaintiff offered evidence tending to show that Fred Peper had paid the rent for a few months after his father's death to keep peace in the family, and that Mr. and Mrs. Bell were the only ones who wanted rent. The plaintiff objected to her brother paying the rent, stating that she thought it might hurt her case, and he did not pay further rent.

Dayton M. Numbers, testifying in rebuttal, said that he had a conversation with Christian Peper a few months before his death, and that Mr. Peper said that he was ready to give "Carrie" a deed for the property, but that Nick (meaning Mr. Bell) advised him not to do so while the divorce was pending, and that Mr. Peper said he was going to "let it lay until that got through." This witness first said this was two or three months before Peper's death, but upon cross-examination he said it was during the time the divorce suit was pending.

The parties stipulated that plaintiff, during her occupancy of the premises in controversy, had expended as payment for taxes and repairs the sum of \$4051.72.

The court rendered judgment, dismissing plaintiff's bill, and ordered the land to be partitioned; ordered the same sold and that the proceeds be divided according to

the respective interests of the parties. The court also entered judgment against plaintiff for that portion of the rent which would fall to the interest represented by defendants. Plaintiff duly appealed.

I. The appellant contends that the court erred in refusing to hold that plaintiff was the sole owner of the land in controversy. In support of this contention it is insisted in substance that plaintiff's source of title is two-fold, viz.:

1. That by reason of the full performance by appellant of the alleged contract between herself and her father she became vested with the equitable title to said land.

2. That by reason of being in the adverse possession of said property for more than ten years she is now the legal owner of said property.

If appellant's claim of title under either of the above theories is sound the judgment below was erroneous.

We will first discuss the claim to title based upon the theory of ten years of adverse possession.

II. That appellant has been in the actual, open, hostile, exclusive, adverse and continuous possession of said real estate claiming to own the same since, at least, from the date of the original institution of this suit, to-wit, from January 27, 1904, until January 29, 1917, the date of the trial below, is we think conclusively established by the record.

If the defendants had any doubt as to the nature of appellant's possession prior thereto, all doubt must have been dispelled when on January 27, 1904, appellant, then in possession, instituted this suit to determine the title under the provisions of Section 650, Revised Statutes 1899, and asserted her claim to the entire title.

Even if defendants' theory be correct that the appellant and defendants then owned the land as tenants in common, such conduct upon the part of appellant then in actual possession amounted to an ouster of the other

cotenants and was certainly sufficient to impart notice to them that an adverse possession was intended to be asserted against them. [Seibert v. Hope, 221 Mo. 630, l. c. 635; Misenheimer v. Amos, 221 Mo. 362, l. c. 371.]

If then nothing transpired to arrest the running of the ten-year Statute of Limitations her legal title by adverse possession ripened long prior to February 25, 1916, the date of the filing of the fourth amended petition herein (being the petition upon which the trial was had).

Did anything transpire to arrest the running of the ten-year Statute of Limitations? This is the rather difficult question now for determination.

Said Statute (Sec. 1879, R. S. 1909) provides as follows:

“No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person . . . unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action.”

It becomes at once apparent that if defendants or those under whom they claim have arrested the operation of said statute in the instant case it must have been accomplished by the bringing of some action within the ten-year period therein specified *to recover said land or the possession thereof*.

It was of course not necessary that defendant should have instituted a separate and independent suit to recover said land or the possession thereof, but any proper plea to that effect in the answer by way of cross-bill would have been sufficient.

Defendants contend that the allegations of the joint answer filed in this case on June 5, 1907, was sufficient to arrest the running of the above statute. Said answer (caption and signature omitted) was as follows:

“Now come defendants in the above entitled cause by leave of court, and for answer to the amended peti-

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tion herein, admit that defendants Charles G. Peper and Adolphus S. Peper are sons of Christian Peper, deceased; that defendant, Margaret P. Bell, is the daughter of said Christian Peper, deceased; that defendant, Nicholas M. Bell, is her husband; that defendant, Caroline M. Peper, is the wife of defendant Charles G. Peper; that defendants Adolphus S. Peper, Charles G. Peper and Margaret P. Bell claim an interest in the real estate described in plaintiff's amended petition, as devisees under the will of said Christian Peper, deceased; that defendant, Caroline M. Peper claims an interest therein as the wife of defendant Charles G. Peper; that defendant Nicholas M. Bell claims an interest therein as husband of Margaret P. Bell; that one Frederick C. Peper is a son of said Christian Peper, deceased, and a beneficiary under his will; that one Christian Cornelius, otherwise known as Christian Peper, Jr., is a beneficiary under the will of said Christian Peper, deceased; that Caroline B. Peper is the wife of said Christian Cornelius, otherwise known as Christian Peper, Jr.; that said Frederick C. Peper, Christian Cornelius, otherwise known as Christian Peper, Jr., and Caroline B. Peper, his wife, claim no interest or estate in said property, and defendants deny each and every other allegation in said amended petition contained.

"Further answering, defendants say that if it be true (which defendants deny) that said Christian Peper, deceased, during his lifetime, made the promise and agreement with plaintiff concerning said real estate as set forth in plaintiff's amended petition, such promises and agreement were not in writing and therefore are within the Statute of Frauds and consequently void.

"Further answering, and by way of cross-bill, defendants state that the aforesaid Christian Peper, who died September 26, 1903, was the owner at the time of his death of the real estate described in plaintiff's amended petition, consisting of a house and lot, of the value of about thirty-five thousand dollars, located on Washington Avenue in the City of St. Louis, and known as 4448.

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that upon the death of said Christian Peper he left a will which was duly admitted to probate in the Probate Court of the City of St. Louis, whereby he devised five-sixtieths of all his real estate, including said parcel of ground described in plaintiff's amended petition, to one Christian Cornelius, otherwise known as Christian Peper, Jr., and eleven-sixtieths of all his real estate, including said parcel of ground described in plaintiff's amended petition, to each one of his children, to-wit, Adolphus S. Peper, Charles G. Peper, Margaret P. Bell, defendants herein, and Frederick C. Peper; that ever since the death of said Christian Peper, to-wit, September 26, 1903, plaintiff has occupied the premises in question as her residence, and that the rental value of the same is one hundred and twenty-five dollars per month, and that no part of the same has been paid except for the first, second and third months following the death of said Christian Peper; that shortly after the death of said Christian Peper, said Frederick C. Peper and Christian Cornelius, otherwise known as Christian Peper, Jr., together with his wife, for a valuable consideration, conveyed to plaintiff all their right, title and interest in and to said parcel of ground described in plaintiff's amended petition; that by virtue of said conveyances, plaintiff, in addition to the interest devised to her under her father's will, became and is the owner of an undivided twenty-seven sixtieths of said parcel of ground described in her amended petition, and defendants Adolphus S. Peper, Charles G. Peper and Margaret P. Bell are each owners of an undivided eleven-sixtieths of said parcel of ground, defendant Nicholas M. Bell having a right of curtesy in his wife's share therein, and defendant Caroline M. Peper having a dower interest in her husband's share therein.

"Said defendants therefore ask this court to ascertain and determine the estate, title and interest of said parties respectively in said real estate, and to define and adjudge the title, estate and interest of the parties severally in and to said real property as above set forth.

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"Said defendants further ask that this court, having declared and adjudged that plaintiff and defendants Adolphus S. Peper, Charles G. Peper and Margaret P. Bell are tenants in common of said real estate, and declared the interest of the parties accordingly, will order and decree a partition thereof. Defendants state that owing to the character of the property, and the number of owners, a partition in kind is impracticable, and they therefore ask that this court will order a sale of the property at public vendue for cash in accordance with the statute in such cases made and provided, and that the proceeds of such sale be divided between plaintiff and said defendants according to their respective interests, after the taking from plaintiff's share such sum as the court may ascertain to be due from her by way of rent for the use and occupation of said premises; and for such other relief as may be just and proper, defendants will ever pray."

It is somewhat difficult to designate the above cross-bill by any name. It appears that a statutory action to determine title, an action for rent, and an action for partition are all joined in one count of the cross-bill. But however that may be, can any portion of said cross-bill be said to state a cause of action which has for its object the recovery of the land here in suit, or the possession of the same?

That portion which seeks a recovery of rent certainly does not state such an action. Neither can that portion of the cross-bill which amounts to nothing more than a statutory action at law to determine title under Section 2535, Revised Statutes 1909, be considered an action to recover land as contemplated in said Section 1879, *supra*.

In fact it has been recently held by both divisions of this court that the ten-year Statute of Limitations (Sec. 1879, *supra*) has no application to bringing of a mere statutory action to determine title. [*Armor v. Frey*, 253 Mo. 447, l. c. 474, et seq.; *Powell v. Powell*, 267 Mo. 117, l. c. 129.]



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The remaining portion of the cross-bill pleads an action in partition, but the cross-bill in nowise seeks to assert any possessory right of the defendants to said land. It has been held that a suit in partition is not an action for the recovery of lands under Section 1879, *supra*. [Real Estate Co. v. Lindell, 133 Mo. 386, l. c. 399.]

Whether or not, where partition is asked in a suit in equity, the party so asking, being out of possession, may by proper plea for affirmative relief assert his possessory rights and ask that the court award a writ of possession in connection with the equitable partition, and whether such a plea if made in time would stop the running of the statute, we need not here determine, for the simple reason that no such attempt was made by defendants in the present action.

Had defendants by separate count in ejectment, or by otherwise sufficient allegation of facts in the answer for affirmative relief, pleaded the ouster, asserted their rights to possession of their respective interest in said land and prayed that they be restored to said possession, we would not hesitate to say that such a pleading, made within the ten-year period, would have arrested the running of the statute. But no such right was asserted or asked for in the pleadings filed.

Under such conditions we are unable to discover any reason for holding that the operation of the Statute of Limitations was in any manner stayed by the pending litigation. Appellant's action to determine title was not only not inconsistent with, but was entirely consistent with, her adverse possession.

We have been somewhat slow and reluctant in arriving at the result above announced, but, the situation carefully and thoroughly considered, we are unable to justify any other conclusion.

It is well settled that adverse possession, accompanied by the well known prerequisites, for the statutory period, not only bars any action for the recovery of the land, but also operates to vest the full legal title in the possessor. [Merchants' Bank v. Evans, 51 Mo. 335, l. c. 347; Allen

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v. Mansfield; 108 Mo. 343, l. c. 348; Kirton v. Bull, 168 Mo. 622, l. c. 633; Adams v. Gossom, 228 Mo. 566, l. c. 578.]

In the case of Scannell v. American Soda Fountain Co., 161 Mo. 606, l. c. 618, VALLLIANT, J., speaking for the court said: "A title acquired by adverse possession under our statute is in every respect as good for purposes of attack or defense, as a title by deeds running back to the Government" (Citing many cases).

It therefore follows that appellant, by reason of her adverse possession for ten years or more before the filing of the fourth amended petition, became vested with the legal fee-simple title to said land, and the trial court erred in not so holding.

Since the ruling on the above point determines the case, it becomes unnecessary to determine what title or interest appellant may have acquired by reason of performance on her part of the alleged contract.

The judgment is reversed and the cause remanded with directions to the said circuit court to enter judgment dismissing defendants' separate cross-bill and decreeing the fee-simple title of said premises to be in the appellant and that she recover costs of suit against the defendants.

*Williamson, Blair and Walker, JJ., concur; Goode, Graves and Woodson, JJ., dissent.*

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THE STATE ex rel. WALKER D. HINES v. JOHN W. CALHOUN, Judge of Circuit Court.

In Banc, March 15, 1920.

1. **JURISDICTION:** Venue: Railroad. A railroad company, whose line of road runs into only one county of the State and has an office or agent in no other, can be sued only in such county.
2. ———: ———: Director General of Railroads: Agent. The usual and customary business of a railroad company consists in the receipt of freight and passengers at various points on its line, the transportation of them thereon, their delivery at other points

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thereon, the issuance of bills of lading, the sale of tickets, and the keeping of books and accounts of the company relating to such transactions; and the Director-General of Railroads, appointed under an act of Congress directing the President to take charge of, operate and control all railroads, is not such an agent in a county in which the railroad company which has caused plaintiff's injury has no place of business and into which its line of road does not run, and the circuit court of such county has no jurisdiction over the person of the Director General, although he is found in the county and summons is served upon him therein. Whether or not the action for damages be grounded on the Employers' Liability Act, his duties and liabilities are just as broad territorially as were those of the railroad company before he took charge of its properties. If the railroad company could not have been sued in a county prior to that time, he cannot be.

3. ———: ———: ———: **General Orders 18-A and 18-B.** .General Orders 18-A and 18-B of the Director-General of Railroads, providing that suits against carriers while under Federal control must be brought in the county or district where plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, cannot be construed to oust a state court of jurisdiction of the subject-matter of an action over which the laws of the State give it jurisdiction; but if the railroad company, whose lines are being operated by the Director-General, has a line of road in a certain county in this State, he can be sued in such county, provided he can be found there, though the service of summons would have to be made under Section 1751, and not under Section 1754, Revised Statutes 1909.

*Prohibition.*

**PRELIMINARY WRIT MADE PERMANENT.**

*James F. Green and H. H. Larimore* for relator.

The suit of Joseph Sharamitaro v. Union Pacific Railroad Company et al., No. 20072, pending in the circuit court of the city of St. Louis, is an attempt to subject Walker D. Hines to the jurisdiction of the said court, in violation of the plain provisions of the statutes of Missouri relating to the venue of suits against corporations, because of which said circuit court was possessed of no jurisdiction over the person of the Director General of

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Railroads. Sec. 1754, R. S. 1909; Sec. 10, chap. 25, U. S. Statutes at Large, Vol. 40, p. 452; Rutherford v. U. P. Railroad Co., 254 Fed. 880; Friesen v. Ry. Co., 254 Fed. 875; State ex rel. v. Jones, 270 Mo. 230.

*H. C. Whitehill* for respondent; *A. L. Levi* of counsel.

(1) In filing suit in the circuit court of the city of St. Louis, the plaintiff was entitled to obtain service upon the relator, if he could be "found" within said jurisdiction, as provided by the statutory law of Missouri, as he was made a party defendant in a representative capacity. Secs. 1734, 1751, 1760, R. S. 1909, as amended by Laws 1915, p. 225. (2) Actions accruing in a foreign state or under the Federal Employers' Liability Act may be brought in any of the courts of this State by the persons entitled to the proceeds thereof. Sec. 1736, R. S. 1909; *Lee v. Railroad*, 195 Mo. 400; *Jones v. Railroad*, 178 Mo. 525; *Newlin v. Railroad*, 222 Mo. 375; Act of Congress, April 22, 1908, U. S. Comp. Stat. 1916, sec. 8657; Second Employers' Liability Cases, 223 U. S. 1; 14th Amendment, U. S. Const. sec. 1. (3) Service of process was had upon relator in strict accordance with the provisions of the statutes governing the same, as relator is neither a corporation nor a joint stock company. Sec. 1760, R. S. 1909, as amended by Laws 1915, p. 225; State ex rel. v. Sale, 232 Mo. 173. (4) If relator had any objection to the circuit court's jurisdiction over the subject of the action, or the person of the defendant, it was his duty to raise same by demurrer or by a plea. Sec. 1800, R. S. 1909; State ex rel. v. Grimm, 239 Mo. 135; *Newcomb v. Railroad*, 182 Mo. 707; *Glendale Lbr. Co. v. Barker Lbr. Co.*, 152 Mo. App. 386; *Hanson v. Neal*, 215 Mo. 256; *Johnson v. Detrick*, 152 Mo. App. 235; *Hendricks v. Calloway*, 211 Mo. 536. (5) By filing the motion to dismiss and to quash the summons, and introducing as a part of said motion matters *dehors* the record, i. e., the petition and

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the return, which would require evidence, amounts to a waiver of the right to have the return quashed and the suit dismissed, no matter how the summons was served, and constitutes an entry of appearance to the action. State ex rel. v. Sale, 232 Mo. 176; State ex rel. v. Grimm, 239 Mo. 135; Thomasson v. Insurance Co., 217 Mo. 495; Meyer v. Insurance Co., 184 Mo. 481; Barrow SS. Co. v. Kane, 170 U. S. 100; Mahr v. U. P. Ry. Co., 140 Fed. 921. (6) The Director General of Railroads is a carrier under the Act of Congress, March 21, 1918, and may be sued in the several states according to the laws thereof. Sec. 10, chap. 25, U. S. Stat. at Large, Vol. 40, p. 452; Rutherford v. U. P. Railroad, 254 Fed. 880. (7) The General Orders of relator as Director General of Railroads are not effective to limit the venue of actions to a certain county or district, or to affect the jurisdiction of state courts or the laws thereof regarding institution of suits or services of process therein. Friesen v. Railroad, 254 Fed. 875; Moore v. Railroad, 174 N. Y. S. 60; El Paso R. Co. v. Lovick, 210 S. W. 283; Jensen v. Lehigh Valley Railroad, 255 Fed. 795; Commercial Club v. Railroad, 171 N. W. 312; Matter of N. Y. Cent. Railroad, 174 N. Y. Supp. 682; Muir v. Railroad, 247 Fed. 896; Lavalley v. Railroad, 172 N. W. 918; Gowan v. McAdoo, 173 N. W. 440; McGregor v. Great Nor. Ry. Co., 172 N. W. 841; Vaughn v. State, 81 So. 417; Matter of Morris Ave. Bridge, 174 N. Y. Supp. 682; Dahn v. McAdoo, 256 Fed. 549; Johnson v. McAdoo, 257 Fed. 757; U. S. Railroad Admn. v. Burch, 254 Fed. 140.

WOODSON, J.—The suit out of which this proceeding grew, was instituted in the Circuit Court of the City of St. Louis of Joseph Sharamitaro, administrator of the estate of Leo Sharamitaro, deceased, to recover damages caused by the alleged negligence of the Union Pacific Railroad Company, a corporation, for injuries received by the deceased, which resulted in his death. A summons was issued out of the clerk's office of the Circuit Court of the City of St. Louis, and directed to the sheriff of Jackson County, Missouri, for service. Serv-

ice was duly had upon the agent of the defendant's company, in said county, that being the only county in the State into which the defendant's road ran or in which it did business. A return of the petition and service of the summons was made by said sheriff of the Circuit Court of the City of St. Louis. Upon the motion of the railroad company, said service was quashed. After the quashing of said return, the plaintiff filed an amended petition in the same court, making Walker D. Hines, Director General of Railroads, a party defendant, and on or about May 19, 1919, a summons was issued for said Walker D. Hines, directed to the sheriff of the City of St. Louis for service, and in pursuance thereto the said sheriff on said day made the following return upon the summons:

"Executed this writ in the City of St. Louis, Missouri, this 19th day of May, 1919, by delivering a copy of the writ and petition as furnished by the clerk to Walker D. Hines, Director General of the Railroads, defendant herein."

Thereupon the defendant, Hines, filed the following motion in the cause:

"Your relator further avers that thereafter, on the 2nd day of June, 1919, defendant Walker D. Hines, Director General of Railroads, appearing for that purpose only, filed a motion to quash such service and dismiss said cause on the ground that said court by such pretended service acquired no jurisdiction of the subject of the action, nor of the defendant Walker D. Hines, Director General of Railroads, and on June 25th thereafter such special motion of defendant Hines to quash such return of service and dismiss said cause was by the Circuit Court of the City of St. Louis, over the objections and exceptions of said defendant Hines, overruled.

"Your relator also avers that by the terms and provisions of Section 1754, Revised Statutes 1909, suits against railroad corporations can only be brought and maintained in counties through which the railroad being operated by such railroad company runs, or in

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counties where such railroad company shall have or usually keep an office or agent for the transaction of its usual and customary business; that, as above set out, neither the Union Pacific Railroad Company nor Walker D. Hines, Director General of Railroads operating the Union Pacific Railroad, at any time kept within the limits of the City of St. Louis, an office or agent for the transaction of their usual and customary business, and also, as above stated, the Union Pacific Railroad Company at no time operated a railroad running into or through said City of St. Louis or St. Louis County, Missouri.

“Because of all of which your relator says that the said Circuit Court of said City of St. Louis, by the pretended service above set out and the return of the sheriff thereon, acquired no jurisdiction of the subject of the action, nor of the person of Walker D. Hines, Director General of Railroads, in charge of and operating the Union Pacific Railroad, and, having quashed the pretended service had upon the Union Pacific Railroad Company, said court was also without jurisdiction to make said Walker D. Hines, Director General of Railroads, a party defendant to the action, or cause any summons to be issued for such Director General to the sheriff of the City of St. Louis, Missouri, or otherwise.

“Relator has attached hereto the petition in said case No. 20072, wherein the Director General of Railroads was made a party defendant; a copy of the summons issued thereon to the sheriff of the City of St. Louis, directing him to summon the said Walker D. Hines, Director General of Railroads; the return of the sheriff thereon; the special motion of said defendant Walker D. Hines, Director General of Railroads, to quash such pretended service; and the order of court overruling such motion; all certified to by the clerk of the Circuit Court of the City of St. Louis, Missouri, and made a part of this application.

“Finally, your relator avers that the respondent herein, Judge of said Circuit Court of the City of St.

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Louis, is about to proceed in said cause No. 20072 against the said Walker D. Hines, Director General of Railroads, a defendant therein, and to exercise jurisdiction in said cause against said defendant; that your petitioner is without adequate remedy in the premises to prevent the exercise of such jurisdiction by respondent other than by prohibition to be issued by this Honorable Court.

"Wherefore, your petitioner, the State of Missouri at the relation of Walker D. Hines, Director General of Railroads in charge of and operating the Union Pacific Railroad, prays that this Honorable Court will issue against respondent, John W. Calhoun, Judge of the Circuit Court of the City of St. Louis, Missouri, its writ of prohibition, restraining and preventing him from hearing or taking further cognizance or action in said cause of Joseph Sharamitaro, Administrator, v. Union Pacific Railroad Company et al., No. 20072, in so far as the said Walker D. Hines, Director General of Railroads, is concerned, and that said respondent, pending the final hearing of this cause, be prohibited and restrained from taking any cognizance or action in said suit pending before him against the said Director General of Railroads, and that, upon final hearing, said prohibition against respondent be made absolute."

After consideration, this court on the 13th day of October, 1919, issued its preliminary rule against the respondent, which was in conventional form. Thereupon the respondent Calhoun made the following return:

"Comes now the Honorable John W. Calhoun, respondent herein, and for answer and return to the petition and application for writ in prohibition heretofore issued:

"First. Admits that he is one of the duly elected, qualified and acting judges of the Circuit Court of the City of St. Louis, Missouri, comprising the Eighth Judicial District of said State, and as such is the presiding judge in Division No. 1 of said circuit court, known as the Assignment Division thereof. That the



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suit mentioned in the application for this writ was duly filed in the office of the clerk of said court and is now pending before your respondent as judge of said Division No. 1, thereof. That it will be the duty of respondent to hear and determine the pleadings in respect of said suit during the time of his presiding over said division, to-wit, from October 1, 1919, to January 1, 1920.

“Second, Respondent further states that the said suit of Sharamitaro, Administrator, v. Union Pacific Railroad and Walker D. Hines, Director General of Railroads, was at the time of its filing immediately transferred to Division No. 1 known as the Assignment Division of the Circuit Court of the City of St. Louis, Missouri. That thereafter while said cause was so pending in said division as aforesaid, the Honorable Charles B. Davis, one of the duly elected, qualified and acting judges of the Circuit Court of the City of St. Louis, Missouri, comprising the Eighth Judicial District, was regularly assigned to preside over said assignment division of said court, and during his tenure therein there was filed in said cause a certain motion of said Director General of Railroads, Walker D. Hines, to dismiss said cause and to quash the sheriff’s return thereon, which is in words and figures as follows” (which was in conventional form, but not mentioned here): “That thereafter the Respondent, Hines, filed the following motion to dismiss:

“ ‘Now comes Walker D. Hines, Director General of Railroads, for the purpose of this motion only and for no other purpose, and moves to quash the summons issued herein for the reason that, upon the face of the record, this court has no jurisdiction to issue any summons for this defendant, Walker D. Hines, or for the Union Pacific Railroad Company; that no service has been had upon any agent of the Union Pacific Railroad Company in the City of St. Louis, or within the jurisdiction of this court, and that the action is instituted in this jurisdiction in violation of General Order No. 50 and General Order No. 50-A issued by said Director General of Railroads, copies of which orders are hereto attached and made a part of this motion.

“Wherefore, defendant asks that the summons be quashed and that the cause shall be dismissed, for which he will every pray.”

“That, thereafter, on June 25, 1919, said motion coming on for hearing was, by the court, through the said Honorable Charles B. Davis, presiding therein, overruled, so that at this time, the said defendant, Walker D. Hines, as Director General of Railroads, is required, under the statute, either to answer, demur or otherwise plead to the petition upon which this cause is founded, and which is now pending as aforesaid.

“Third. Respondent further states that this is a cause of action based upon an Act of Congress of April 22, 1908, known as the Federal Employers’ Liability Act, and is for damages for an alleged wrongful and negligent injury of plaintiff’s intestate, which resulted in his death in the State of Wyoming while an employee of the said defendant, Union Pacific Railroad, which was then and there being operated by the defendant, Walker D. Hines, Director General of Railroads, and in said suit it is alleged that both said employer and employee were at the time engaged in interstate commerce within the meaning of said Act of Congress.

“Fourth. For further answer, respondent states that, under and by the terms and provisions of said Act of Congress mentioned as aforesaid, the term ‘Common Carrier’ as used in said act shall include a receiver or receivers, or other persons or corporations charged with the duty of the management and operation of the business of a common carrier, and that the said Walker D. Hines is and was at all the times mentioned in said cause the duly acting Director General of Railroads, and, as such, in charge of the operation, control and management of said Union Pacific Railroads, and that, as such Director General of Railroads, the said Walker D. Hines is and was at all times herein mentioned amenable to said Act of Congress and the provisions thereof.

“Fifth. For further answer, respondent states that, under the Act of Congress, approved March 21,

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1919, entitled, 'An Act to provide for the operation of transportation systems while under Federal control,' it is expressly provided that 'carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law' and that, by virtue of such authority, the Director General of Railroads under said General Orders No. 18-B and 18-A, has provided as follows, to-wit:

" 'It is, therefore, ordered that all suits against carriers, while under Federal control, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.'

"That it appears from the face of the petition filed in said cause of *Sharamitaro, Administrator, v. Union Pacific Railroads*, that the plaintiff therein was appointed by the Probate Court of the City of St. Louis, Missouri, the duly acting administrator, and was at the time of said suit in charge and control of said estate as said administrator, and at the time of his said appointment and the institution of this said suit is and was in the City of St. Louis, Missouri.

"Sixth. Further answering, respondent stated that, under General Orders No. 50 and 50-A of the Director General of Railroads, it was provided, in part, as follows, to-wit:

" 'That actions at law, claim for death or injury to a person arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise. That the pleadings in all such actions at law or proceedings now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may, on application, be

amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.'

"That said plaintiff administrator in said suit has amended his said cause of action by substituting and adding thereto the said Walker D. Hines, Director General of Railroads, as party defendant, upon which amendment summons was duly issued by the clerk of the said court and service made, as will appear from the face of said return, which is set forth in the application for this writ.

"Seventh. Respondent further states that by the provision of Section 1751, Revised Statutes 1909, which were in force at the time said action was commenced and which in part provide that suit may be brought by summons in the county within which the plaintiff resides and the defendant may be found in that it conclusively appears by the return of the sheriff that said Walker D. Hines, Director General of Railroads, defendant in said action, was personally served within the jurisdiction of the court wherein the plaintiff resided at the time said action was commenced.

"Eighth. Respondent further states that after the filing of said petition in said cause as aforesaid, and the personal service upon the defendant, Walker D. Hines, Director General of Railroads, in charge of the operation, management and control of said Union Pacific Railroad, a party defendant, submitted to the court a pleading in the nature of a motion to dismiss said cause of action and to quash the return of the sheriff made thereon, in which motion said defendant alleged that the court had no jurisdiction over the subject-matter of the cause and no jurisdiction to issue any summons for said defendant, Walker D. Hines, in his representative capacity or for said Union Pacific Railroad, and that said action so instituted in the jurisdiction of said court was in direct violation of General Orders No. 50 and 50-A, above referred to, issued by said Director General of Railroads, copies of which orders were attached

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to said motion and made a part thereof. That by said action, that is, the filing of said motion to dismiss said cause of action and to quash the return of the sheriff thereon and by reference to matters which, *dehors* the record, constitute a general entry of appearance by said Director General of Railroads as aforesaid, to the jurisdiction of said court and has been held by this Honorable Court on numerous occasions.

“Ninth. Further answering, respondent denies that said action so pending in said circuit court is governed by the provisions of Section 1754, Revised Statutes 1909, entitled ‘Suits Against Corporations—Where Commenced,’ for the reason that said suit by reason of the substitution and amendment whereby said Director General of Railroads is made a party defendant and as such in charge of the operation, management and control of the Union Pacific Railroad, is not a suit against a corporation, but is a proceeding commenced under Section 8663 of the United State Compiled Statutes, Annotated 1916, against a receiver or receivers or other persons charged with the duty of the management and operation of the business of a common carrier. That said Director General of Railroads under the acts of Congress and the proclamation of the President of the United States is a receiver or other person in a representative capacity charged with the duty of the management and operation of the business of a common carrier and is therefore subject to personal service as by the statutes of Missouri in such cases made and provided.

“Tenth. Further answering, respondent states that the said Director General of Railroads has attempted by said General Orders 50 and 50-A, heretofore issued, and above referred to, to state when and how and upon whom process of a state court may be served in actions wherein said Director General of Railroads is a party defendant; that said orders of said Director General of Railroads in so far as they attempt to designate a different manner of service of process than is set out in the statutes of the State of Missouri, are void and

of no effect, as they attempt to set aside and nullify the expressed statutory law of the State of Missouri regarding the venue of actions and the service of process therein and amounts to a denial of due process of law as guaranteed by both the Federal and State Constitutions. That said orders of said Director General of Railroads in so far as they attempt to provide for service of process as above set forth, amount to legislative enactment by said Director General of Railroads regarding the venue and jurisdiction of state courts and are therefore void and of no effect.

"Wherefore, having fully answered herein, respondent prays that the temporary order of prohibition be dissolved; that the Circuit Court of the City of St. Louis, Missouri, and the said John W. Calhoun, presiding judge of Division No. 1 thereof, be ordered to further proceed with the cause of action herein prohibited, and that this respondent be discharged hence with his costs."

Relator thereupon filed its motion for judgment on the pleadings and upon the record as thus made the case is pending for decision.

As we view the record the only proposition presented for our determination is the proper construction of Section 1754, Revised Statutes 1909. It reads as follows:

"Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad  
**Venue.** company owning, controlling or operating a railroad running into or through two or more counties in this State, then in either of such counties, or in any county where such corporation shall have or usually keep an office or agent for the transaction of their usual and customary business."

It is conceded by the pleadings that the Union Pacific Railroad Company has no line of road running into or through the city of St. Louis, or into any other county of the State, except the County of Jackson, and that it has no office or agent in the city of St. Louis for the transaction of its "usual and customary business,"

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unless the Director General of Railroads may be considered such an agent. Clearly he is not such an agent, for he has no office where the usual and customary business of the company is transacted in the City of St. Louis, nor does he transact any of such business for the company in said city.

The *usual and customary* business of a railroad company consists in the receipt of freight and passengers, at various points on its road and to transport and deliver them at other points thereon, and to issue bills of lading, the sale of tickets, and keeping the books and accounts of the company relating to such business transactions. There is nothing in this statute lending color to the contention that the Director General has anything in the world to do with such business. It is done by various local agents and employees, wherever that road transacts such business.

The Director General is performing an extraordinary business, that of managing and controlling the operation of all the railroads in the United States, the Union Pacific included. Should it be  
**Director General.** conceded that the amendment of the petition making the Director General was the same as the institution of a new suit against him, yet that fact alone would not authorize the service of summons on him, in the City of St. Louis, under said Section 1754, for the obvious reason that the Act of Congress of April 22, 1908, known as the "Employers' Liability Act," provides that the term "common carrier," as used in said act, should include a receiver or receivers, or other persons or corporations charged with the duty of the management and operation of the business of a "common carrier." If we take the language of the act literally, and according to its clear meaning, and concede that the Director General became, by the amendment of the petition, substituted for, and in lieu of the Union Pacific Railroad Company, yet it cannot be logically contended from that fact that he could be sued when the company could not be sued, prior to the date when the road passed into the hands of the Director General. It must

be admitted that prior to the date when the defendant company passed into the hands of the Director General, it could not have been sued in this case in the City of St. Louis, and there is no language in said Section 1754, nor in said Act of Congress, extending to the plaintiff the right to institute this suit in a county where he had no such right prior to the time the Director General took charge of the road. His duties and liabilities are just as broad territorially and otherwise, as the road itself was, prior to that date.

This view of the case reduces the other questions presented by counsel to academic propositions, and we will not pass on them until we reach them, in a proper case.

The orders made by the Director General, heretofore referred to, cannot be so construed as to oust any court of this State of the jurisdiction of the subject-matter of any action over which the laws thereof give it jurisdiction, and should this suit have been brought in the Circuit Court of Jackson County, then service could have been had upon the person of the

**Order 18-A.** Director General, could he have been found there. This service, however, would have been under Section 1751, Revised Statutes 1909, not under Section 1754. But in my opinion, the orders referred to are enabling orders and not disabling in character; that is, they were designed to give the courts jurisdiction over the person of the Director General, by proper service, in those courts where they have jurisdiction of the subject-matter of the suit, but where the laws make no provision for the service of summons on the person of the Director General, for instance. In my opinion this suit under the orders mentioned might have been brought in Kansas City, or in proper court in the State of Wyoming, and service had upon the Director General anywhere he might be found in the United States, otherwise the orders are wholly impotent and meaningless; but as this suit was not brought in Jackson County where the defendant transacted its ordinary business, the preliminary writ heretofore issued is made permanent. All concur.



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THE STATE ex rel. B. F. BUSH, Receiver of ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, v. JOHN T. STURGIS et al., Judges of Springfield Court of Appeals.

Division Two, March 26, 1920.

1. **CONFLICT IN DECISIONS: Certiorari: Extent of Review.** The Supreme Court, on *certiorari*, based on an allegation that the decision of the Court of Appeals contravenes certain decisions of the Supreme Court, is limited in its review to the opinion of the Court of Appeals. If it does not disclose a conflict with the former rulings of the Supreme Court, the power of superintendence is at an end.
2. ———: **Variance Between Theory of Trial and On Appeal.** A variance between the theory upon which the case was tried and the theory upon which the judgment was affirmed in the Court of Appeals, to be available in quashing its decision, must be of such a character as to constitute an essential factor in determining defendant's liability. The difference in the two theories must involve a matter essential to the rendition of the judgment affirmed.
3. ———: ———: **Immaterial Variance.** The petition alleged that defendant's negligence consisted in its failure "to give the statutory signal, by bell or whistle, as the train approached and passed over the public crossing." The answer charged that "deceased went upon the railroad track in front of a running train, heedlessly and without looking or listening." The reply was that "the night was very dark, the engine without a headlight and pushing a car in front, and no signal whatever was given." The petition charged and the jury found that deceased reached the crossing by traveling a public highway. The Court of Appeals held that "if defendant's liability is to rest on the finding that the deceased approached the crossing along the public road" the verdict cannot stand, but also held that plaintiff's right to recover was not dependent on the manner in which he approached the crossing, but that the cause of his death was the manner in which the train approached the crossing, it being its duty, since he was actually on the public crossing when struck, to give him some effective warning, and its failure to do so was negligence. *Held*, that the variance was immaterial, and the decision of the Court of Appeals is not in conflict with previous decisions of the Supreme Court.

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4. ———: ———: ———: **Trespasser.** The rule that crossing signals are for the benefit of travelers on public highways and not for trespassers has no application where deceased was not a trespasser, but actually on the public street at the time the train struck him.
5. ———: ———: **Ruling on Former Appeal: Law of Case.** That a ruling on a former appeal may become the law of the case on a second appeal is applicable only when such prior ruling is determinative of some issue in the case.
6. ———: ———: ———: ———: **New Evidence.** If on a new trial after a verdict is reversed, material evidence on the question decided is produced, the ruling on the first appeal does not become the law of the case.
7. ———: **Recovery on Reply.** Decisions of the Supreme Court to the effect that plaintiff must recover, if at all, on a cause of action stated in the petition, and not on one stated in the reply, have no application to a decision of the Court of Appeals which rules, and properly under the facts, that plaintiff's right to recover was limited to the cause of action stated in the petition.

*Certiorari.***WRIT QUASHED.**

*J. F. Green and Barbour & McDavid* for relator.

(1) In disposing of the case on appeal, the respondents have done so on a theory not presented below and thus have affirmed the cause on issues never presented to the trial court or jury by pleadings or instructions. In so doing respondents have failed to follow the rule announced on that subject in the latest controlling decisions of the Supreme Court in *Brunswick v. Standard Accident Ins. Co.*, 213 S. W. 46; *Degonia v. Railroad*, 224 Mo. 588; *Chinn v. Naylor*, 182 Mo. 595; *Deschener v. Railroad*, 200 Mo. 332; *Mirrieles v. Ry. Co.*, 163 Mo. 486; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 369; *Henry County v. Citizens Bank*, 208 Mo. 226. (2) A reading of respondents' opinion discloses that the case was affirmed on issues and matters contained only in the replication and not in the petition. In so doing respondents

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have failed to follow a long line of decisions of the Supreme Court wherein it has been held that a plaintiff must recover, if at all, on the matters alleged in the petition, and may not eke out such petition by matters brought into the case by reply. *Mathieson v. Railroad*, 219 Mo. 522. (3) Crossing signals are for the benefit only of travelers on the public highway, and not for trespassers, and trespassers may not expect or depend upon signals and they may not expect or depend upon headlights. It has been so ruled in the following cases: *De-gonia v. Railroad*, 224 Mo. 592; *Burger v. Ry. Co.*, 112 Mo. 246; *Frye v. Ry. Co.*, 200 Mo. 407; *Bell v. Railroad*, 72 Mo. 58; *Maxey v. Ry. Co.*, 113 Mo. 11; *Gurley v. Ry. Co.*, 104 Mo. 223; *Evans v. Ry. Co.*, 62 Mo. 57; *Ayers v. Railroad*, 190 Mo. 237; *Milliken v. Commission Co.*, 202 Mo. 654; *Moss v. Fitch*, 212 Mo. 502; *Hill v. Mining Co.*, 119 Mo. 30. (4) The law as settled by the Supreme Court is that where a case has been tried and appealed the opinion rendered by the appellate court on such an appeal becomes the law of that case for any subsequent trial and is binding on the trial court, the parties in interest, and on the appellate court on any subsequent appeal. *May v. Crawford*, 150 Mo. 524; *Benton v. St. Louis*, 248 Mo. 102; *Gracey v. St. Louis*, 221 Mo. 5; *Armor v. Frey*, 253 Mo. 465; *Bridge Co. v. Stone*, 194 Mo. 184. See opinion on previous appeal of this case of the Springfield Court of Appeals, 198 Mo. App. 615.

*Collins, Holloday & Stough, Geo. W. Thornberry and Hamlin & Hamlin* for respondents.

(1) A judgment clearly for the right party under the facts and the law applicable thereto whether declared to the jury or not declared to the jury should not be disturbed for the very good reason that by such judgment the real aim of the law is accomplished. Facts do not give way to theory nor are shadows or technicalities the real trunk of the law. And in a case of this sort a pertinent inquiry always is, has the object of the law

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been accomplished? Boyes' Admr. v. Smiths' Admr., 16 Mo. 322. (2) In a proceeding of this nature the Supreme Court wholly ascertains the facts in a case from the written opinion of the judges of the Court of Appeals. State ex rel. United Rys. Co. v. Reynolds, 257 Mo. 19; State ex rel. Commonwealth Trust Co. v. Reynolds, 213 S. W. 804. (3) It cannot be said by relator that the plaintiff pursued one theory in the trial court and then changed her theory in the Court of Appeals. (4) The Court of Appeals having adjudged and determined from the whole record before it upon what real or actual theory this case was tried, suppose it erred in its judgment, this court cannot quash its record. State ex rel. Brown v. Broadus, 216 Mo. 336.

WALKER, C. J.—*Certiorari* to the Springfield Court of Appeals to review the record of that court in the case of Susie E. Kerr against Bush, Receiver of the St. Louis, Iron Mountain & Southern Railway Company for damages for the killing of her husband through the negligence of that company. Upon a trial before a jury a verdict was rendered in her favor in the sum of \$3500. From this finding an appeal was perfected to the Springfield Court of Appeals, which affirmed the judgment of the trial court (215 S. W. 393). We are asked to quash the record of the Court of Appeals on the ground that its ruling contravenes certain decisions of this court.

I. The limit of our review is the opinion of the Court of Appeals. If it does not disclose a conflict with the former rulings of this court then our power of superintendence is at an end. [State ex rel. **Limit of Review.** United Rys. Co. v. Reynolds, 257 Mo. 19, 165 S. W. 729; State ex rel. Dunham v. Ellison, 213 S. W. (Mo.) 459; State ex rel. Com. Tr. Co. v. Reynolds, 213 S. W. (Mo.) 804].

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II, The first contention as to a contrariety of opinion is that the Court of Appeals disposed of the case upon a different theory from that upon **Variance.** which it was tried below. As to the theory at the trial, the opinion states that "the negligence, alleged in the petition, is the failure of the defendant to give the statutory signal by bell or whistle on the train in question approaching and passing over the public crossing. The petition alleges and the jury found that the deceased reached this crossing by traveling the public highway. In plaintiff's reply primarily to meet the defense of contributory negligence in that the deceased went on the railroad track in front of the moving train heedlessly and without looking or listening, it is alleged 'that the night was very dark, the engine without a headlight and pushing a car in front and that no signal whatever was given for this crossing.' "

The court, after reviewing the testimony at length, states "that there is neither any presumption nor any evidence on which to base a finding that the deceased approached the crossing where he was killed along the dirt road and not along the railroad." Following this conclusion the court adds "that if defendant's liability is to rest on the finding that the deceased approached the crossing along the public road, then to sustain such verdict would be violative of the rule that where the injury may with equal or greater probability have resulted from a different cause for which the defendant is not liable, then the verdict cannot stand; for it devolves on the plaintiff to prove with reasonable certainty that the cause for which the defendant is liable produced the result and this cannot be left to conjecture" (citing cases).

It is evident, therefore, that the specific nature of relator's contention as to a variance between the theory of the trial court and the Court of Appeals consists in their respective findings as to the manner in which the deceased approached the crossing. This difference to avail the defendant must be of such a

nature as to constitute an essential factor in determining defendant's liability. A mere difference in findings not so determinative will not authorize a ruling adverse to the judgment. This in no wise militates against the well established rule that if an injury may have resulted from one of two causes for one of which and not the other the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture the defendant is not liable.

To this effect and no further is our ruling in *Degonia v. Railroad*, 224 Mo. 588, in which we held that although there was a good case on the facts it was not submitted upon a proper theory of the law and hence the judgment could not be sustained.

In *Henry County v. Citizens Bank*, 208 Mo. 225, we held that a suit could not be brought upon one cause of action and a recovery had upon another; and that a case could not be tried upon one theory and a recovery had upon another on appeal.

In *Deschner v. Railroad*, 200 Mo. 332, we held that where a case was tried and instructions on both sides proceeded on the theory that it was the motorman's duty to see and warn the injured party, the case will be reviewed upon that theory in the appellate court.

In *MdGrath v. St. Louis Tr. Co.*, 197 Mo. 105, specific acts of negligence having been pleaded, a recovery if had at all must be upon the acts as pleaded.

In *Chinn v. Naylor*, 182 Mo. 594, where the case was tried below upon the theory that the land in controversy was an accretion to the shore land of plaintiff, the latter would not be heard upon appeal upon a different theory.

In *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 369, we held that litigants will not be permitted to contest a proceeding upon one theory and on appeal shift their position by demanding formal proof of facts practically admitted in the court below.

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In *Mirrielees v. Railroad*, 163 Mo. 486, where both parties tried the case upon the theory that the defendant was bound to exercise ordinary care to prevent injury to a trespasser after it knew of his peril, we are relieved upon a review of the case here from considering whether a carrier's liability is limited to willful or wanton injuries or extends to injuries caused by want of ordinary care.

From these cases, relied upon by relator, and many others which might be cited to the same effect, it appears that the difference in theory between the trial of a case and its review and disposition upon appeal must, to authorize the invoking of the rule, involve a matter essential to the rendition of the judgment. The correctness of this conclusion is rendered more apparent when we consider the province of an appellate court, which is that of review. Such review is for the purpose of ascertaining if the real matters in issue were tried without error. Other than this the court has no concern because the trial court's ruling upon an immaterial matter is not error (*Lesser Cot. Co. v. Railroad*, 114 Fed. 133, 52 C. C. A. 95; *Drew v. School Twp.*, 146 Iowa, 721); further than this the appellate court, having no original jurisdiction, cannot on appeal consider a matter not submitted below (*Woods v. Bryan*, 41 S. C. 74, 44 Am. St. 688). An illuminating dissenting opinion of WHEELER, J., in *Coles v. Kelsey*, 2 Tex. 541, 47 Am. D. 661, is apposite in this connection. It is to this effect: "If an objection not raised in the court below could be considered in the appellate court there would be no assurance there would ever be an end to the litigation; for should the judgment be reversed on such ground and the cause be again brought before the appellate court some new objection not before taken would require the judgment to be reversed and the cause remanded and the same process might be continued indefinitely." [See also 3 C. J. p. 691, sec. 580 and notes, and 4 C. J. p. 661, sec. 2556 and notes.]

It remains to be determined, therefore, whether the diverse findings of the trial court and the Court of Appeals in regard to the manner in which the deceased approached the crossing is of such a nature as to bring the case within the rule of a difference in theory between the trial and the appellate court. The Court of Appeals holds that if defendant's liability is to rest upon the finding of the trial court in this regard the verdict cannot stand. Considered alone this is an unqualified holding of non-liability under the facts stated. But construed with reference to the nature of the facts found and in connection with the court's subsequent language and its disposition of the case upon issues essential to a recovery it cannot be held to be a determinative ruling upon a matter at issue.

While it is true, as stated by the Court of Appeals, that "it devolves upon a plaintiff to prove with reasonable certainty that the cause for which a defendant is liable produced the result," the manner of the approach of the deceased to the crossing had no relation to or connection with the cause which resulted in his death. This cause was the manner in which the defendant's train approached the crossing. The duty of the defendant was to give some effective warning to free itself from a charge of negligence, taking into consideration the physical location, at the time, of the deceased and his *status* towards the defendant due to said location. The evidence discloses that he was on the public crossing when struck by defendant's train. Thus located, he was not a trespasser, and this is true so far as concerns the liability of the defendant, regardless of the manner in which the deceased approached the crossing; this conclusion accords with reason and is in harmony with our ruling in the recent case of *Torrance v. Pryor*, 210 S. W. 430, which was followed by the Court of Appeals. *GRAVES, J.*, speaking for the court in that case, said in effect that "whilst in a public highway one cannot be a trespasser. An intention to shortly leave the highway (along the railroad) would not change



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a person's right to be in the street, nor make her a trespasser upon the railroad property in the street."

This case fixes the *status* of the person injured as a non-trespasser and as a consequence defines the conditions of defendant's liability. In so holding, the immateriality of the fact as to the manner in which the injured party reached the highway is clearly indicated. Being immaterial, it is not an issue. Not being an issue it cannot be held to constitute a theory upon which the case was tried and hence the relator's contention must be overruled.

III. No discussion is required to demonstrate the inapplicability, under the facts in this case, of the rule, sought to be invoked by relator, that crossing signals are for the benefit of travelers on the public highway and not for trespassers. We have shown that the deceased was not a trespasser and hence not subject to the rule. The numerous cases cited, therefore, in support of this rule, with the correctness of which under a proper state of facts we have no controversy, are not in contravention of the ruling of the Court of Appeals in this case and their citation is futile to affect its judgment.

IV. On a former appeal of this case (198 Mo. App. l. c. 615) the Court of Appeals held that if the deceased came upon the crossing by walking along the railroad track instead of the public road he was not entitled to recover on the negligence alleged that his approach was by such public road. In the present opinion the court held that although the deceased did approach the crossing by walking along the railroad track the defendant was nevertheless liable. This, relator contends, is error under the rule that the former opinion, absent any new evidence, became the law upon a subsequent appeal. This rule becomes apposite only when the ruling in the former opinion is determinative of some issue in the case. We have shown that the

finding as to the manner of the approach of the deceased to the crossing was not to be so classified. Decisive of nothing, it could not, therefore, then or thereafter, become the law of the case. This conclusion aside, however, there is in this case an equally potent reason why the rule cannot under its express limitations, be made applicable. The facts as to the manner in which the deceased approached the crossing are not the same in the instant as in the former case. Note the language pertinent hereto of the Court of Appeals in its opinion here under review (215 S. W. 1. c. 395): "On this point the evidence is not the same as at the previous trial. On the other appeal we said, and such was then the evidence, that no one saw the deceased after he left the town of Galena going eastward toward his home, and no one testified as to whether, on leaving the town and crossing James River on the bridge, he chose to follow the public road or to follow a much-used path onto and along the railroad track to the fatal crossing. Considering the muddy condition of the dirt road and the dangers of going along the railroad, one could 'guess' at which he did. But on this trial the defendant produced two witnesses . . . who each testified that they saw the deceased going toward his home along the railroad track on the evening he was killed. Neither had testified at the other trial, and each said he had not told any one of seeing the deceased going along the track till just before this trial. . . . According to the positive evidence of these two witnesses, the deceased went onto the railroad after crossing the bridge just east of Galena and walked along said track toward his home."

This excerpt is sufficient to show that in this regard there was a material difference in the testimony at the two trials. Under such circumstances the doctrine as to the binding force of a former ruling cannot be effectively invoked. A review of the cases on this subject is confirmatory of this conclusion. [State v. Powell, 266 Mo. 106; *Armor v. Frey*, 253 Mo. 465; *Curtis v. Sexton*, 252 Mo. 248; *Benton v. St. Louis*,

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248 Mo. 102; Gracey v. St. Louis, 221 Mo. 5; Bridge Co. v. Stone, 194 Mo. 184; May v. Crawford, 150 Mo. 524; Keeton v. National Union, 182 S. W. 798.]

V. Relator further contends that the opinion affirms the judgment of the trial court upon issues and matters contained only in the reply and not in the petition, in contravention of the rule that a plaintiff must recover if at all on the matters alleged in the petition and not eke out the latter by matters brought into the case by the reply. This contention, inadvertently of course, does not correctly state the Court of Appeals' findings. After stating the substance of the pleadings, which we have set out *in haec verba* in Paragraph II of this opinion, the court indicates the manner in which it construed the reply in so far as the latter affected the disposition of the case, in that its effect and purpose was "primarily to meet the defense of contributory negligence set up in the defendant's answer." This was in harmony with the theory upon which the case was tried in which the instructions limited the plaintiff's right of recovery to the grounds of negligence stated in the petition. The language of the opinion being that:

"On an examination of the entire record, we find that the case was actually tried and determined on this theory. The real issue presented and tried was whether any signals were given or any effective warning sound made by this train in approaching and passing this crossing and whether any conspicuous light was being displayed, the dark and stormy condition being practically conceded. The evidence is such that the jury must have found either that the full statutory signals were given by this train or that no warning signals whatever were given; that either the headlight was burning as usual or that no light was displayed. No middle ground was presented. Under the evidence and instructions, the jury could have acquitted the deceased of contributory negligence only by finding that this

train approached this crossing and struck deceased thereon without any sufficient warning by sound or whistle to apprise him in the exercise of due care of its approach.

"Such, also, are the issues presented by the pleadings taken as a whole, for, while the petition counts on the failure to give the statutory signals, the reply is:

"The plaintiff for her reply denies that her husband could have seen or heard the train prior to going upon the track, because the night was very dark and the engine drawing said train was running without a light upon the front end and that a car was attached to the front end of said engine and was being pushed in front of said engine; that no signal whatever was given; no light upon said engine; therefore, owing to the conditions aforesaid, her husband had no warning of the approach of said train."

"The defendant was therefore fully informed of the exact facts which plaintiff intended to prove and which plaintiff's evidence as believed by the jury did prove. It is also true that, while plaintiff's instructions predicate liability on failure to give the arbitrary statutory signals by bell or whistle on approaching this crossing, yet to so find under the evidence necessarily was to find that no signals or warning whatever were given; and by defendant's instruction on contributory negligence the finding must have been for defendant if the deceased could by using due care in looking and listening have discovered the coming train in time to have avoided being struck by it."

That the reply, therefore, either at the trial or upon appeal, had or was attempted to be given any other office than to inform the defendant of the facts which plaintiff intended to prove in rebuttal of the plea of contributory negligence, is not apparent from the record.

The plaintiff's right of recovery having been limited to the cause of action stated in her petition and the triers of the facts having, under proper instructions, so found, there is no substantial merit in this contention.

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As a consequence the following cases: Mathieson v. Railroad, 219 Mo. 552; Milliken v. Com. Co., 202 Mo. 654; Moss v. Fitch, 212 Mo. 503, and cases reviewed therein; Hill v. Rich Hill Coal Co., 119 Mo. 9, and Rhodes v. Land & Lumber Co., 105 Mo. App. 279, which announce the doctrine, well established in this jurisdiction, that a plaintiff must recover, if at all, upon the cause of action stated in the petition and not upon one stated in the reply, are inapplicable.

Finding no contravention in the opinion of the Court of Appeals with the last previous rulings of this court, there exists no ground for our interference with the judgment and our writ is therefore quashed. All concur.

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LILLIE J. WETZEL et al., Appellants, v. MOLLIE T. HECHT.

Division Two, March 26, 1920.

1. **WILL: Intention: Implied Life Estate.** In construing a will effect must be given to the intention of the testator and, if necessary to carry out that intention, an estate, such as a life estate, may arise by implication from the terms of the will.
2. ———: ———: **Life Estate or Homestead.** The will provided that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, that the will gave to testator's wife, not a homestead simply, to be terminated upon her subsequent marriage, but a life estate.
3. ———: ———: **Homestead During Life.** Where the will declares that "my homestead shall be left intact so long as my wife lives," the estate of the wife cannot be terminated by her subsequent marriage without ignoring the words "so long as she lives," and also the word "intact."

4. ———: ———: **Homestead and Quarantine.** If it be contended that by the word "homestead" used in the will declaring "my homestead shall be left intact as long as my wife lives" the testator had in mind the statutory homestead given by Section 6708, Revised Statutes 1909, whereby the widow, there being no minor children, is vested with a homestead during her life or widowhood, it may as well be contended that he had in mind Section 366, which provides that a widow, until dower be assigned, may remain in and enjoy the mansion house.
5. ———: ———: **Quarantine and Assignment of Dower.** Under Section 366, Revised Statutes 1909, which provides that a widow may remain in and enjoy the mansion house until dower be assigned, her quarantine interest is not lost until dower is assigned, and by virtue of that interest she may maintain or defeat ejectment, or she may convey it and her grantee acquires the same right. And if the will declared "my homestead shall be left intact so long as my wife lives," her dower cannot be assigned during her life, and consequently her quarantine right must remain undisturbed as long as she lives, for otherwise the homestead could not remain "intact." By the words used the testator enlarged the estate which the statute gave his widow, and removed the contingency upon which it would terminate on her remarriage, and the result is a life estate by implication.
6. ———: ———: **Reconciling Inconsistencies: The Word Survive.** The will declared that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, first, that by the word "survive" he meant if the two daughters survive the lifetime of the widow; *second*, that by the words "after she leaves the homestead" he did not mean "if she leaves," but meant any contingency by which she separated herself from the control of the property, either by death, marriage or abandonment, but that neither marriage nor abandonment would divest her of her quarantine right, which could be done only by her death. Thus construed, the apparent inconsistencies are harmonized, and the result is a life estate to her.

Appeal from Morgan Circuit court.—*Hon. John G. Slate*,  
Judge.

**AFFIRMED.**

*Capron, Butcher & Knoop and John J. Jones* for appellants.

(1) The controlling rule in construing wills, is to give effect to the intention of the testator as the same may be gathered from the instrument, if not violative of some established rule of law. *Cox v. Jones*, 229 Mo. 53. (2) The intention of the testator must be gathered from the will itself. *Middleton v. Dudding*, 183 S. W. 443. (3) The ordinary primary meaning is to be given the language of a will, unless other terms used in the will disclose that such meaning is repugnant to the testator's intention. *Cox v. Jones*, 229 Mo. 53; *Mace v. Hollenbeak*, 175 S. W. 876; *Lich v. Lich*, 158 Mo. App. 400. (4) While a testator may dispose of his property by a necessary implied devise, yet the presumption is very strong against his having intended any devise not set forth in his will. There must be a probability arising from the whole will so strong that the testator intended to make the devise that it cannot be supposed that any other intention existed in the mind of the testator. Page on Wills, sec. 468; *Eneberg v. Carter*, 98 Mo. 651; 30 Am. & Eng. Ency. (2 Ed.) 697; 1 Jarman on Wills (6 Ed.), p. 499.

*R. M. Livesay and A. T. Dumm* for respondent.

(1) The true intent and meaning of the testator is the cardinal principle in the construction of a will. And the court, construing the will, should place itself as nearly as may be in the position of the testator, so as to interpret his words in the light he intended they should have. Sec. 583, R. S. 1909; *Gibson v. Gibson*, 24 Mo. 227; *Cross v. Hoch*, 149 Mo. 325; *Stewart v. Jones*, 219 Mo. 614; *Papin v. Piednoir*, 205 Mo. 521; *Tisdale v. Prather*, 210 Mo. 407. (2) The testator by the will involved in this case intended to devise to his wife, the defendant here, a life estate in the premises in question, and the trial court properly so found. *Burnet v. Burnet*, 244 Mo. 491; *Armor v. Frey*, 226 Mo. 646; *Roth v. Rauschenbusch*,

173 Mo. 582; Walton v. Drumtra, 152 Mo. 489; Stewart v. Jones, 219 Mo. 614; Cross v. Hoch, 149 Mo. 325; 8 Words & Phrases, pp. 6826, 6827, et seq. (3) A life estate may be created, without using express words, by implication from a will, or by language of equivalent meaning. Burnet v. Burnet, 244 Mo. 498; Cross v. Hoch, 149 Mo. 343; Roth v. Rauschenbusch, 173 Mo. 591; Armor v. Frey, 226 Mo. 669. (4) The evidence in this case does not show an abandonment by the widow of the homestead in question; on the contrary, the evidence clearly and conclusively shows that she had not "left" the homestead. King v. King, 155 Mo. 406; Leake v. King, 85 Mo. 413; Holmes v. Nichols, 93 Mo. App. 515; Hines v. Nelson, 24 S. W. (Tex.) 541; 1 Words & Phrases, p. 8.

WHITE, C.—This suit, under Section 2535, Revised Statutes 1909, is to determine title to a tract of land in Versailles, Morgan County, Missouri. M. Joachimi, owner of the land, died in January, 1911, leaving a will. The construction of this will presents the issue between the parties. The defendant is the widow of M. Joachimi; the plaintiffs are his daughters by a former marriage.

Joachimi had four children at the time of his death; two daughters, Lillie, now Lillie Wetzel, and Carrie Walter, plaintiffs; and two sons, E. A. Joachimi and M. L. Joachimi, Jr. The will of M. Joachimi, executed in May, 1910, after giving a nominal sum to each of his two sons, E. A. Joachimi and M. L. Joachimi, Jr., disposes of the balance of the property in this clause:

"To my daughter, Carrie Walter, and to Lillie Joachimi, and my dear wife, Mollie G. Joachimi, shall share alike in money and property left, after my debts are paid, except my homestead in Spurlock's Addition, shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie Walter; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two, and in case of



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Carrie Walter's death before Lillie Joachimi's death, said property shall go to Lillie Joachimi or her heirs."

This suit involves the property mentioned as the homestead in Spurlock Addition. After her husband's death in 1911 Mrs. Joachimi continued to live on the place until March, 1916, when she went to live with her daughter by a former marriage, at Tipton, Missouri. While there she married one Hecht in June, 1917, and had been living with him as his wife from that time up to the time of the trial in December, 1917. While she lived at Tipton, and up to the time of the trial, the defendant continued in possession of the property; that is, she placed someone in charge who paid a small rent, and she retained charge of two rooms and kept a large part of her furniture in the house. She visited it occasionally from time to time during the two years she was absent, before and after her marriage, and sometimes stayed all night there. She paid the taxes for 1916, and some prior years. She made repairs, papered, painted and put in sidewalks at different periods during the year 1917, both before and after her marriage to Hecht. She paid all the taxes that were paid on the property after her husband's death. She swore that neither of the plaintiffs had ever paid any taxes or made any repairs on the place; that no one lived with her, but that she lived alone on the homestead after her husband's death until she went to live with her daughter in Tipton. She said she had no intention of going away from this home permanently; that she always looked upon it as her home, and treated it as a home. The trial court held that under the provision of the will set out the defendant had a life estate in the property and rendered judgment in her favor. The plaintiffs appealed.

I. The rule of construction invoked by counsel for both parties is well established in this State—that in construing a will effect must be given to the **Implication.** intention of the testator and, if necessary to carry out that intention, an estate, such as a life estate,

may arise by implication from the terms of the will. [Burnet v. Burnet, 244 Mo. 491, l. c. 498; Walton v. Drumtra, 152 Mo. 489, l. c. 507; Armor v. Frey, 226 Mo. 646, l. c. 669.] To say that a life estate may be vested by implication is but another way of saying that the will must be construed from its four corners, the intention of the testator gathered from the entire instrument and carried into effect whether apt operative terms are used or not. The will, it is stated, was written by the testator himself, without the advice of an attorney, and the lack of aptness in the use of words is due to that fact.

II. It is argued by appellant that the testator, in using the word "homestead" in the will, had in mind the statutory homestead, provided by Section 6708, Revised Statutes 1909, whereby the widow, there being no minor children, is vested with an estate in the homestead during her life or widowhood. It is contended, therefore, that her rights ceased to exist by virtue of the statute when she remarried, and that no expression in the will prevented that result. If the testator had the law in mind it might as well be said he had in mind Section 366, Revised Statutes 1909, which provides that a widow, until dower be assigned, may remain in and enjoy the mansion house. Every one is presumed to know the law, and in writing a will a testator must be presumed to write it with understanding as to how the law would affect his estate in absence of any modification of that effect by the will. Under Section 366 the widow's quarantine interest is not lost until dower is assigned and by virtue of that interest she may maintain ejectment or defeat ejectment. She may convey it and her grantee acquires the same right. [Phillips v. Presson, 172 Mo. 24, l. c. 27; Thomas v. Black, 113 Mo. 66, l. c. 70; King v. King, 155 Mo. 406; Brown v. Moore, 74 Mo. 633; Smith v. Stephens, 164 Mo. l. c. 422; Coulson v. La Plant, 196 S. W. 1144, l. c. 1147.] The case last cited, opinion by Judge GRAVES, reaffirms the doctrine in the earlier cases construing that section. The right of the defendant under Section 366, therefore, would defeat recovery in this

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case, and would dispose of the case without further consideration but that the trial court in rendering judgment determined the widow was entitled to a life estate.

III. In order to determine the propriety of that judgment the paragraph of the will quoted must be considered and construed. The first provision that challenges attention is the statement: "My homestead in Spurlock Addition shall be left *intact* as long as my wife lives."

It is argued by appellant that by the word "*intact*" it is meant there should be no sale or partition of the property while the wife lives. By the same token, if it is to remain intact, whatever interest the wife had in it must remain the same as long as she lives. We couldn't give effect to what evidently was in the testator's mind if her interest might be extinguished or abridged during the time of her life. If *no* change in interest could take place, then her dower could not be assigned and consequently her quarantine right must remain undisturbed as long as she lives.

If the testator had the statute relating to homesteads in mind, evidently it was his purpose to extend her right beyond the period of any marriage and until her death; that is, he enlarged the estate which the statute gave her and removed the contingency by which it would terminate on her marriage. Further, if he had in mind the quarantine section (366) then he intended to forbid an action to assign dower during her life. This conclusion results, on the theory of the appellant, as to the testator's intention in using the word "*intact*."

What is meant by vesting a life estate by implication is that the intention of the testator when carried out has the effect to give one the enjoyment of property for life. Here, if the effect of the will is to prohibit an assignment of dower and thus to give the widow the full possession and enjoyment of the premises under her quarantine right as long as she lived—a right which she might convey and could not forfeit—the result is a life estate. There seems no escape from that conclusion.

That result is reenforced by the last sentence in that paragraph of the will. In speaking of his two daughters the testator adds:

"If neither occupy the property, and if both survive, said property may be sold and proceeds divided between two."

By this he means the homestead need not remain "intact" if the two daughters survive. Survive what? Obviously the period during which the property is to remain intact, the lifetime of the widow.

This construction would be quite easy but for the apparent contradiction in the sentence sandwiched between the two mentioned, as follows: "After she (the widow) leaves the homestead, Lillie shall have this as a home and after her death it shall go to Carrie Walter."

It is necessary to harmonize that with the rest, if possible, so as to give effect to the whole. It is significant that the testator did not say *if* she leaves, but he said "*after*" she leaves. It was not a contingency but a certainty which he was providing for. There could be no certainty that she would abandon the property; there was certainty that she would die. It might be possible to say the testator had in mind any contingency by which she separated herself from the control of the property, either by death, marriage or abandonment. Either of these contingencies would be, in a sense, *leaving the property*. However, neither marriage nor abandonment would divest her of her quarantine right, to the full and complete enjoyment of the premises. That could only be accomplished by her death.

To recapitulate: the intention of the testator, as expressed in rather clear terms when he said the property was to be "intact" during the life of his wife, was to prohibit any change in that *status* of the property so far as her interest in it was concerned. All her rights, given to her by law, were to remain as long as she lived, and good against any assaults upon same either by suit for partition, assignment of dower, or any other proceeding which would affect the present state of title. Under that

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provision of the will and the quarantine statute she acquired in effect a life estate.

This would harmonize the apparent inconsistencies in the paragraph of the will quoted.

The judgment is affirmed. *Railey and Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

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### THE STATE v. HENRY C. FOSTER, Appellant.

Division Two, March 26, 1920.

1. **INFORMATION: Shooting at Another.** An information charging a crime under Section 4481, Revised Statutes 1909, is sufficient if it follows the language of the statute, since it embodies all the essential elements of the crime denounced and hence need not be pleaded.
2. ———: ———: **Omission of Word Of.** It is essential that an information charging the crime denounced by Section 4481, Revised Statutes 1909, allege that the act of shooting at another was done "on purpose and of his malice aforethought;" but the omission of the word "of" in the phrase that defendant "did then and there, on purpose and his malice aforethought," etc., was not misleading did not destroy the sense of the sentence, nor impair the sufficiency of the information.
3. ———: ———: **Did Commit Great Bodily Harm.** An information charging that defendant did shoot another "with intent....him....to maim and commit great bodily harm" does not, by the use of the words "commit great bodily harm," injure defendant. These words are equivalents of an averment of an intent on defendant's part to inflict an injury permanent in its nature, or more serious than an ordinary battery, but they mean nothing more than the word "maim," and at their worst are only tautological.
4. ———: ———: **Jeofails.** Under the Statute of Jeofails (Sec. 5115, R. S. 1909) no defect or imperfection in an information which does not tend to the prejudice of the substantial rights of appellant can be of any avail on appeal.

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5. **INTENT: Specific Proof: Inference.** Even if proof of specific intent to maim another is necessary in view of the language of the statute, proof of facts from which the intent may be inferred is sufficient; and such inference may be drawn from proof that defendant shot another with a double-barreled shot-gun, loaded with leaden balls and gun powder, on purpose and of malice aforethought, and inflicted wounds calculated to maim.
6. ———: **To Maim: Meaning.** The word "maim" has no technical meaning, but means to inflict some serious bodily injury. Thus classified, there is no occasion to couple the commission of the act of shooting at another with a specific "intent to maim" in order to constitute the offense denounced by the statute (Sec. 4481, R. S. 1909).
7. **INSTRUCTION: Omission of Words "Of Malice Aforethought:" Jail Sentence.** The statute (Sec. 4481, R. S. 1909) declared that "every person who shall, on purpose and of his malice aforethought, shoot at another, with intent to maim," etc., shall be punished by imprisonment in the penitentiary not exceeding ten years. The instruction for the State, designed to cover the whole case, omitted the words "with malice aforethought." *Held*, not error, for two reasons: *first*, another statute (Sec. 4904, R. S. 1909) authorized a conviction for a less offense and defendant's punishment was assessed at twelve months' imprisonment in the county jail; and, *second*, errors in instructions concerning a higher degree of the offense than that of which a defendant was convicted are not available to him.

Appeal from Buchanan Circuit Court.—*Hon. H. W. Uttz*, Judge.

**AFFIRMED.**

*Randolph & Randolph* for appellant.

(1) The information in this case is fatally defective and the demurrer thereto should have been sustained. It is difficult to tell which section of the statutes this information was attempted to be drawn under. The charge of assault with intent to maim is coupled with the language "and commit great bodily harm." Section 4481 is the section which mentions particularly assault with intent to maim, but there is no such offense in the statutes as the offense of "commit great bodily harm." The offense contemplated by Section 4482 is a distinct of-

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fense and is not an inferior degree of the offense contemplated by Section 4481. State v. Burk, 89 Mo. 639; State v. Lockwood, 119 Mo. 463. The indictment does not allege that the act was done of his malice aforethought, but uses this language: "and did then and there on purpose and his malice aforethought." State v. Rector, 126 Mo. 340. (2) The instruction offered by defendant in the nature of a demurrer to the evidence at the close of the evidence on the part of the State should have been given as there was positively no evidence of any kind or character of any intent to maim. It was clearly shown that the purpose of the defendant was to drive the prosecuting witness from the premises where he was trespassing and tearing down the fence of the defendant. The distance between the prosecuting witness and the defendant at the time the shot was fired would absolutely preclude the idea of an assault with intent to commit the crime of mayhem. Proof of an assault with intent to kill would not meet the evidence required under this information. State v. Kyle, 177 Mo. 659; State v. Ballard, 194 Mo. 634. (3) In that same connection the court made improper remarks in the presence of the jury, and in that same connection the private attorney of the prosecuting witness made and was permitted to make improper remarks in the presence of the jury and to ask questions which were improper, with no other purpose than to create prejudice against the defendant. State v. Ulrich, 110 Mo. 365; State v. Prendible, 165 Mo. 354; State v. Fisher, 124 Mo. 464; State v. Young, 99 Mo. 682. (4) It was improper and prejudicial to the defendant for the court to permit Mr. Lockwood, the private attorney of the prosecuting witness, to cross-examine defendant as to matters concerning which he was not asked on direct examination. R. S. 1909, sec. 5242; State v. Grant, 144 Mo. 63; State v. Hathhorn, 166 Mo. 239; State v. Kyle, 177 Mo. 663; State v. Bell, 212 Mo. 123. (5) The instruction for the State shows an effort to cover both Section 4481 and Section 4482, but does not follow the information in that it does not use the words "malice aforethought" and uses the term "to maim and do great bodily harm." To

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assault with intent to maim is one offense cognizable under Section 4481, and an assault with intent to do great bodily harm is a separate and distinct offense under Section 4482 and they cannot be so combined in one instruction. If there is an intent to maim, then the intent to do great bodily harm is absent, except that maiming might result in great bodily harm. One offense is to do the act prohibited by Section 4480; the other is to do an entirely different act with an entirely different purpose. The punishment mentioned in the instruction is the punishment provided for in Section 4482. There can be no assault with intent to maim except "of malice aforethought," because such an assault is a deliberate assault conceived and carried out for the purpose of maiming the subject of the assault. *State v. Priestley*, 74 Mo. 24; *State v. Dalton*, 106 Mo. 464; *State v. Whittsett*, 111 Mo. 202; *State v. School*, 130 Mo. 396; *State v. Hayden*, 141 Mo. 311. (6) The defendant was entitled to have the jury instructed as to the meaning of the word maim and that the assault must have been with the intent to commit the crime of mayhem. The defendant specifically asked of the court to instruct on that point.

*Frank W. McAllister*, Attorney-General, and *Lewis H. Cook*, Special Assistant, for respondent.

(1) The information is sufficient in form and substance. It fully informs the defendant of the nature and cause of the accusation against him. *State v. Nieuhaus*, 217 Mo. 343; *Kelley's Crim. Law & Proc.* secs. 580-582; R. S. 1909, sec. 4483. (2) The instruction besides defining "feloniously" correctly states the law under Sec. 4483, R. S. 1909. *State v. Webb*, 266 Mo. 680. (3) The appellant complains because the court refused to instruct on the question of whether or not Aubuchon was in the act of committing a trespass when the shot mentioned in evidence was fired. The instruction was properly refused under the evidence in the case. Aubuchon was fifty yards from the appellant constructing a line fence with his back turned when appellant fired without



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warning. The testimony shows that the only reason the prosecuting witness committed an act of trespass was to prohibit the stock of the appellant from trespassing on the land in Aubuchon's possession. Had death resulted from the shooting the appellant would have been guilty of manslaughter in the third degree and the appellant cannot be heard to complain. R. S. 1909, sec. 4463.

WALKER, C. J.—Appellant was convicted in the Circuit Court of Buchanan County in June, 1919, of an assault with intent to maim and do great bodily harm and his punishment assessed at twelve months' imprisonment in the county jail. From the judgment rendered thereon he appeals.

Aside from formal averments, the information is as follows: "that on or about the 7th day of August, 1918, at said county, Henry C. Foster in and upon one Dennis Aubuchon, feloniously, on purpose and of his malice aforethought did make an assault, and did then and there on purpose and his malice aforethought feloniously shoot at him, the said Dennis Aubuchon, with a certain deadly and dangerous weapon, to-wit, a double-barreled shot-gun, loaded then and there with gun powder and leaden balls, which he, the said Henry C. Foster, then and there held in his hand, with intent then and there him, the said Dennis Aubuchon, on purpose, of his malice aforethought, feloniously to maim and commit great bodily harm; against the peace and dignity of the State."

Appellant and the prosecuting witness, Aubuchon, occupied adjoining tracts of land. The former had built a wire gap in a fence which enclosed a small portion of his tract, the purpose of which was to admit his cattle to a spring of water. The fence of which this gap was a part, connected with that enclosing the land of Aubuchon. The latter objected to the use of the gap by the appellant for the purpose mentioned. On the morning of the assault, Aubuchon, aided by his sons and a hired man, went to where the gap was located and proceeded to tear it and the fence connecting it with appellant's land down, and to build a closed fence of his own instead

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of that of appellant. The latter, having been notified of the proceeding, went to the scene, armed with a shot-gun and an axe. Walking towards Aubuchon, he ordered him off of the premises. The latter ignored the order, when the appellant fired at him with the shot-gun, a few shots striking him on the hand and hip. Aubuchon, with his sons and help, left the scene. Appellant thereupon cut the wires of the fence Aubuchon had built and replaced his own fence and the gap.

I. The statute (Sec. 4481, R. S. 1909) upon which this prosecution is based provides, so far as applicable to the facts in evidence, that every person who shall on purpose and of his malice aforethought shoot  
**Information.** at another with the intent to maim such person shall be punished by imprisonment in the penitentiary not exceeding ten years. Thus the crime of shooting at a human being is specifically prohibited and by the terms of the statute classified as a felonious assault. [State v. Curtner, 262 Mo. 218; State v. Bunyard, 253 Mo. l. c. 355.] An essential allegation in a charge based on this statute is that the act was committed feloniously, on purpose and with malice aforethought. [State v. Anderson, 252 Mo. 83; State v. Harris, 209 Mo. l. c. 434; State v. Temple, 194 Mo. l. c. 234; State v. McDonald, 67 Mo. 13; State v. Seward, 42 Mo. l. c. 208; State v. Harris, 34 Mo. 347.] The felonious intent with which the act was committed is properly charged. [State v. Bond, 191 Mo. 567.] As we held in State v. Phelan, 65 Mo. 547, and numerous other cases reviewed in State v. Bond, *supra*, the charging of an offense under Section 4481 is sufficient which follows the language of the statute, which embodies all of the essentials necessary to define the crime denounced and hence more need not be pleaded. [State v. Bersch, 276 Mo. 397.] A charge thus framed conforms not only to the rules of criminal pleading that nothing shall be left to implication or intentment, but to the constitutional requirement that the accused shall be apprised of the nature and cause of the accusation against him. [State v. Stegner, 276 Mo. 427, 297 S. W. l. c. 828.]

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It is also contended that the information is defective in the omission of the word "of" preceding the words "malice aforethought" in the phrase "and did then and there on purpose and his malice aforethought," etc. The omission of the word "of" was not misleading, did not destroy the sense of the sentence from which it was omitted and hence this contention is not entitled to serious consideration. The disposition of the courts in the review of criminal cases, while not ignoring or denying any substantial right of the accused, is to so construe the record of conviction as to promote the administration of justice. Such a purpose would be frustrated by the serious entertainment of such a frivolous contention as is here sought to be introduced. [State v. Keener, 225 Mo. l. c. 494; State v. Perrigin, 258 Mo. l. c. 236; State v. Massey, 274 Mo. 578.]

The addition of the words "and commit great bodily harm" following the word "maim" in the information is also a subject of complaint. In what respect the appellant is injured by this addition we are not told. The added words are the equivalents of an averment of an intent on the part of the appellant to inflict an injury permanent in its nature or more serious than an ordinary battery. [Territory v. Ayre, 15 N. M. 581; Lambert v. State, 80 Neb. 62; Boykin v. People, 22 Colo. 503; State v. West, 45 La. Ann. 14; McDonald v. State, 89 Tenn. 161.] In short, they mean nothing more than is expressed by the word "maim" and the only tenable objection which can be urged to their use is that it is tautological. This may entitle the objection to rhetorical, but not to judicial, consideration. Nor does the use of the words complained of come within the rule of criminal practice that if an allegation is made in an unnecessarily minute manner the proof must satisfy the descriptive as well as the main part, as one is essential to the identity of the other, because the descriptive words here are redundant or mere surplusage, and may be so regarded. [State v. Harris, 209 Mo. 423; State v. Akin, 94 Iowa, 50.] "Lest, therefore," as Lord HALE said, in effect, "such overgrown curiosity and nicety of expres-

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sion as is here exhibited, should become a disease of the law, we apply the timely remedy of overruling this contention." [2 Hale Pl. Cr. 193.]

Notwithstanding the disposal of all of the objections to the information under precedents respectively applicable to each, all might have been held insufficient and immaterial under the liberal provisions of our Statute of Jeofails, in that none embody any defects or imperfections which tend to the prejudice of the substantial rights of the appellant. [Sec. 5115, R. S. 1909; State v. Sovorn, 225 Mo. 589; State v. McConnell, 240 Mo. 272; State v. Massey, 274 Mo. 585; State v. Allen, 267 Mo. 56.]

II. It is contended that there was a failure of proof of a specific intent on the part of appellant to commit the offense with which he was charged. This contention is based upon the assumption that an assault to maim or in fact any assault denounced in Section 4481 supra, belongs to that class of crimes of which a specific intent to accomplish a particular purpose is an essential element, and for which proof of general malice or criminal intent will not sustain a conviction, and where this rule obtains, that the burden is on the State to establish, either by direct or circumstantial evidence, that the act was done with the requisite specific intent. In such cases, however, it is sufficient to prove facts from which the specific intent may be inferred. Such inference is authorized even in homicide cases from the character of the assault, the use of a deadly weapon and other attendant circumstances. To illustrate: In State v. Wansong, 271 Mo. l. c. 57, citing many cases, we held, in a case of felonious assault, that the use of a deadly weapon, in the absence of qualifying facts, would authorize a presumption of law as to the murderous intent of the defendant. In State v. Merkel, 189 Mo. l. c. 319, an embezzlement case, we held that the intent of the defendant necessary to constitute the offense with which he was charged may be inferred from the doing of the wrongful act. In State v. Hall, 85 Mo. l. c. 673, a

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larceny case, a like rule was announced to the effect that the defendant's intent was presumed to be that which was the natural consequence of the offense with which he was charged. In *State v. Doyle*, 107 Mo. l. c. 44, a case of felonious wounding, an instruction was held proper which told the jury that they might, in the absence of qualifying facts, if they found that the defendant committed the assault with a deadly weapon, infer that he intended to kill.

If the nature of the offense at bar is such as to justify the conclusion that proof of specific intent is necessary to sustain a conviction, then a like rule will apply to the foregoing cases, in which the offenses described are of such a nature as to render like proof necessary. As shown, however, we held affirmatively in these cases that a legal presumption of criminal intent as charged would arise from proof of the unlawful act. To particularize, that proof of an assault would authorize an inference of an intent to kill; and that proof of obtaining and withholding property under the facts in evidence would authorize the inference in the one case of an intent to embezzle and in the other of an intent to steal. The proof in the case at bar shows an assault with a deadly weapon and the infliction of wounds calculated to maim. Measured, therefore, by our former precedents, the act and attitude of the appellant at the time of the offense, his use of a deadly weapon, and the manner in which he inflicted the wounds upon the prosecuting witness (*State v. Grant*, 144 Mo. 56), are ample to sustain the conclusion that he intended the natural and probable consequences of his act and that an inference of guilty intent as charged was authorized.

While we regard the evidence adduced as sufficient to establish the specific intent with which the offense was committed, a reference to the rule announced in *State v. Lentz*, 184 Mo. 223, and in earlier cases, in reference to the proof of such intent, is not inappropriate. We there held that "if the statute does not, in creating the offense, couple with the commission of the act a specific intent, but simply makes the commission of the act a

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criminal offense, and the act is wrong in itself, the intent may be inferred from the unlawful commission of the act."

The appellant is charged with an assault with intent to maim. The phrase "with intent to maim" is simply descriptive of the character of the offense. The words "to maim," as we held in *State v. Nieuhaus*, 217 Mo. 332, have no technical meaning and should be construed in their plain ordinary sense; as usually defined, they mean the infliction of some serious bodily injury. The offense as charged, therefore, under a proper construction of the statute, may be designated as a felonious assault. [*State v. Brown*, 60 Mo. 141; *State v. Thompson*, 30 Mo. 470.] Thus classified, there is no occasion as required by the rule quoted, for coupling the commission of the act with a specific intent to maim in order to constitute the offense charged. Hence proof of the commission of the felonious assault will authorize the presumption of the criminal intent of the appellant as charged.

III. We have reviewed the record in an effort to ascertain if error was committed in the rulings on the testimony. The liberality of the trial court in the admission of testimony for the prosecution, as well as for the defense, is manifested in the length of the transcript. Much of that admitted was irrelevant and that excluded was of a similar nature. The probative facts for the prosecution were plain and simple. They established the assault and the manner in which it was committed. Proof of the latter was sufficient to authorize the inference of criminal intent as charged. No material facts entitled to serious consideration were offered by the appellant in rebuttal. His defense was mainly technical. This will in a measure afford an explanation, if it does not furnish a reason, for the wide range of the testimony, especially that offered on behalf of appellant. A flood-tide of testimony, in the absence of defensive facts, increases opportunities

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for error. Despite this fact we have discovered no ruling upon the testimony which, upon a reasonable interpretation, can be held to have been prejudicial to the defendant.

IV. Our holding as to the sufficiency of the indictment and that of the evidence to sustain the verdict, pretermits any discussion as the propriety of the instruction asked by the appellant in the nature of a demurrer to the evidence.

It is contended that the instruction given by the court covering the case was erroneous in the omission therefrom of the words "with malice aforethought." This would have constituted error if the appellant's punishment had been assessed under the statute upon which the information was based. This was not done, however, but in conformity with the instructions which were authorized by the testimony, and under the authority of Section 4904, Revised Statutes 1909, the conviction was for a less offense than that charged, the punishment being assessed at twelve months in the county jail. Appellant, therefore, has no cause of complaint, not only by reason of this statute, but under the rule of more general application, that we will not lend a listening ear to complaints of errors in instructions of a higher degree than that of which the defendant was convicted. [State v. Gibbs, 186 S. W. 986; State v. Hutchison, 186 S. W. 1000; State v. Fleetwood, 190 S. W. 1.]

V. The somewhat voluble rulings of the court during the progress of the trial added opportunities for objections thereto. However, an examination of these objections discloses no error either in the remarks of the court or of opposing counsel of sufficient materiality to justify our interference.

Accorded a fair trial and escaping with a light punishment, notwithstanding the probative proof of the

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crime as charged, to which there was interposed only a technical defense, the appellant has no just cause of complaint. Under such circumstances it becomes our duty to affirm the judgment of the trial court and it is so ordered. All concur.

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**WEBB-KUNZE CONSTRUCTION COMPANY, Appel-  
lant, v. GILSONITE CONSTRUCTION COMPANY  
and ANHEUSER-BUSCH BREWING ASSOCIA-  
TION.**

**Division Two, March 26, 1920.**

1. **EXCAVATIONS: Measurements: Statute Part of Contract.** The statute (Sec. 11971, R. S. 1909) applies to contracts for making earth excavations and must be read as a part of every contract pertaining thereto. Any rates expressed in the contract must be considered in connection with the statute.
2. ———: ———: **Trenches: Pier Holes: Special Agreement.** The statute (Sec. 11971, R. S. 1909) provides that earth excavations, where no special agreement is made as to measurements, shall be measured by the cubic yard, and that for trenches and pier holes double measurements shall be allowed. The contract provided that the price for excavating trenches should be \$1.15 "per cubic yard." *Held*, that there was no special agreement as to the measurement of trenches, but the contract called for the statutory "cubic yard," and the contract and statute, when considered together, meant that there should be twice as many cubic yards in the same number of cubic feet in the excavation of trenches as there are in other excavations. And the same is true of pier holes; where the contract said that the price for the excavation for pier holes should be \$2 "per cubic yard," it meant that the whole number of cubic yards of 27 cubic feet each thus excavated should be doubled. In each case the words "cubic yard" used in the contract, when applied to trenches and pier holes, meant just one-half the volume of an ordinary cubic yard.
3. ———: ———: ———: ———: ———: **In Specifications.** The contract made the specifications "in their entirety" a part of the excavation contract, and they provided that "proposals for the foregoing work are to be based on the cubic yard," first, "for the



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trenches for retaining walls," and, second, "for the main body of the excavation," and that "estimates are to be based upon the actual amount of material removed according to surveys taken from time to time, by a competent engineer employed by the owner." *Held*, first, that the last clause was not inserted for the purpose of indicating how measurements should be made, but for the purpose of designating by whom they should be made; and, second, there was no special agreement as to the measurements, and the statutory cubic yard was meant, and the statute says that for excavations for "trenches and pier holes double measurements shall be allowed."

4. ———: ———: **Interpretation of Contract: Monthly Settlements.** The interpretation and construction which the parties themselves place upon a contract will be adopted by the court where the contract is ambiguous and reasonably susceptible of different constructions; but monthly payments of eighty-five per cent for work completed, and stated accounts showing the estimates of the excavation work done in cubic yards for trench work and the value thereof, do not indicate that by the words "cubic yards" was meant anything else than the statutory cubic yard, and are not to be considered as a construction of the contract that the contractor was not to be allowed double measurement for such work, as the statute required, unless there is special agreement to the contrary.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings, Judge.*

REVERSED AND REMANDED (*with directions*).

*Kinealy & Kinealy* for appellant.

(1) There can be no question of the right of the Legislature to enact Sec. 11971, R. S. 1909, regulating weights and measurements. *Ex parte House v. Mayes*, 227 Mo. 617. (2) No custom or usage can nullify the statute. *Ex parte House v. Mayes*, 227 Mo. 617; *Green v. Moffett*, 22 Mo. 529. (3) Section 11971 must be read into the contract here in question the same as if set out therein at length. *Zellers v. Surety*, 210 Mo. 86; *Henry Co. v. Salmon*, 201 Mo. 136; *Isenhour v. Barton Co.*, 190 Mo. 163; *State ex rel. v. Rubber Mfg. Co.*, 149 Mo. 181; *Reed v. Painter*, 129 Mo. 674; *State to use v.*

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Berning, 74 Mo. 87. (4) Estoppel as a defense must be pleaded. McClure v. Bank, 263 Mo. 128; Turner v. Edmonston, 210 Mo. 411; Keeney v. McVoy, 206 Mo. 42. (5) To constitute an estoppel by conduct, the other party must have changed his position to his detriment or in some other manner suffered injury. First Natl. Bank v. Ragsdale, 171 Mo. 168; De Berry v. Wheeler, 128 Mo. 84; Johnson-Brinkman Co. v. Railroad, 126 Mo. 344; Bank v. Frame, 112 Mo. 502. (6) Moreover, there can be no estoppel where both parties have the same knowledge or means of knowledge. De Lashmutt v. Teetor, 261 Mo. 412; Harrison v. McReynolds, 183 Mo. 533; Spence v. Renfro, 179 Mo. 417; Austin v. Loring, 63 Mo. 19; Bales v. Perry, 51 Mo. 449. (7) Where a contract is unambiguous the courts will enforce it regardless of any contention that the parties have by their acts given it a construction different from what it is as it is written. Meissner v. Ry. Equipment Co., 211 Mo. 112; Wetmore v. Crouch, 150 Mo. 671; Produce Co. v. Olsen, 188 Mo. App. 181; Laughlin v. Joplin, 161 Mo. App. 161; Bader v. Mill & Lumber Co., 134 Mo. App. 135.

*Nagel & Kirby* for respondents.

(1) The statute on which alone appellant bases its claim and contention for double measurement, does not apply to the facts in the case at bar. R. S. 1909, sec. 11971. (2) The contract here does expressly provide the method in which measurements shall be made, and also the basis upon which estimates shall be made to determine the amounts of compensation for the various kinds of work. (3) Even if the contract were ambiguous on that point, the parties have by their conduct interpreted it contrary to appellant's contentions. Meissner v. Ry. Equipment Co., 211 Mo. 112; Knisely v. Leathe, 178 S. W. 458.

WHITE, C.—The defendant Gilsonite Construction Company had a contract with the Anheuser-Busch Brewing Association to erect a large building on Block 884

## Construction Co. v. Gilsonite Construction Co.

in the City of St. Louis. The Gilsonite Construction Company thereupon made a contract with the plaintiff, Webb-Kunze Construction Company, to do all the excavating for the building. After the excavation was finished satisfactorily to all parties, the plaintiff and the defendant Gilsonite Construction Company disagreed as to the method of measuring the work done in making the excavation. Thereupon the plaintiff filed its mechanic's lien and sued the original contractor, Gilsonite Construction Company, and the owner, the Anheuser-Busch Brewing Association. A judgment was rendered in favor of the plaintiff, enforcing its lien in the sum of \$2,975.64, and interest. This was in accordance with the defendant's theory of the way the work should be measured. The plaintiff claimed that the judgment should be for the full amount sued for, \$19,470.65, in accordance with the plaintiff's method of measurement. The plaintiff then appealed from the judgment.

The only dispute between the parties is as to the method of measuring the work done by the plaintiff. It is not disputed by respondent that if the method which plaintiff employed was correct it is entitled to judgment for the amount sued for, \$19,470.65.

I. The difference arises in the application of the statute, Section 11971, Revised Statutes 1909, to the measurement of trenches and pier holes, as follows:

"Sec. 11971. *Whenever measurements of earthwork, stone masonry work, brickwork, stone-cutting work, plastering work or roofing work is in any case hereafter required to be made for any purpose, and no special agreement as to the measurements has been made* by the parties, the same shall be made and the quantity thereof ascertained in the following manner and by the following rules: Earthwork—EARTH EXCAVATION SHALL BE MEASURED BY THE CUBIC YARD. To ascertain the number of cubic yards of excavation made, take the length and multiply the same by the width and by the average height; the result will give the number of

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cubic feet, which, divided by twenty-seven, will be the amount of cubic yards. For all trenches and pier holes, double measurements shall be allowed. When earth is left in a cellar to protect the adjoining banks or walls, the same may be charged double the amount when required to be removed."

If the pier holes and trenches excavated by the appellant are given double measurements, as provided in that section, then it is entitled to the full amount sued for. The respondents claimed, and the trial court held, that the plaintiff was not entitled to the double measurements, provided in the section because there was a "special agreement as to measurements" as mentioned in the section. That part of the agreement to which the respondent calls attention as to measurements is as follows:

"Article XXI. In consideration of the faithful performance of every provision of this contract, to the satisfaction of Gilsonite Construction Company and the architect, Gilsonite Construction Company will pay to the subcontractor for all of this work and materials in place, under this contract, complete and accepted, the sum of excavation for all trenches including bracing and shoring, \$1.15 per cubic yard.

"Excavation north of present railroad tracks forty cents per cubic yard.

"Excavation for pier holes under outside walls and three lines of piers, running east and west from north end of building with necessary bracing and shoring, two dollars per cubic yard."

It will be observed that the statute has this requirement: "Earth excavation shall be measured by the cubic yard." It then proceeds to provide how a cubic yard shall be determined; the length, breadth and thickness in feet shall be multiplied together and divided by 27 for ordinary excavation; for trenches and pier holes double measurements shall be allowed. That is to say, there shall be twice as many cubic yards in the same number of cubic feet in the excavation of trenches and pier holes

as there are in other excavations. Now that portion of the contract quoted above is not in contradiction of the statute. It only provides the price that shall be paid by the *cubic yard*; \$1.15 a cubic yard for trenches and \$2 a cubic yard for pier holes; 40c per cubic yard for other excavations. The "cubic yard" mentioned in the contract is controlled by the statute; it is a statutory cubic yard.

The statute necessarily applies to contracts for making earth excavations and must be read as a part of every contract of that character. [Isenhour v. Barton County, 190 Mo. 163, l. c. 173; Reed v. Painter, 129 Mo. 674, l. c. 680; Zellars v. Surety Co., 210 Mo. 86, l. c. 92.] The rates expressed in the contract must be considered in connection with the statute. There is not a word in that part of the contract indicating how the work shall be measured or what shall constitute a cubic yard. It relates only to the price to be paid after the measurement is made. The statute defines what is meant by a cubic yard when applied to trenches and pier holes,—just half the volume of an ordinary cubic yard, and the statute would be without meaning altogether if a cubic yard, in the absence of a special agreement, were measured in any other way.

Appellant, however, invokes a statement in the specifications attached to the contract as indicating a special agreement as to measurements. The contract provides, after setting out the work to be done:

"The whole to be in accordance with the drawings and specifications for the work and in strict accordance with the plans and specifications, drawings and details furnished by Widman & Walsh, and Klipstein & Rathmann, architects, hereafter referred to as architects and engineers, and by the Gilsonite Construction Company. The said plans, specifications, drawings and details in their entirety shall be considered as a part of this contract."

Turning to the specifications which the respondent claims furnished a special agreement as to measurements we find this:

"Proposals for the foregoing work are to be based upon the cubic yard:

"(1) For the trenches for retaining walls.

"(2) For the main body of the excavation, including removing old retaining wall on east side of Broadway and all other old walls or rubbish and loose natural rock which may be encountered.

"Estimates are to be based upon the actual amount of material removed according to surveys taken from time to time, and upon completion of the work, by a competent engineer employed by the owner."

We notice that this provision starts with the proposition that "proposals for the foregoing work are to be based upon the cubic yard." So far, we are in strict accord with the statute; a cubic yard, up to this point, must necessarily be a statutory cubic yard. Then follows immediately "(1) for the trenches for retaining walls." That certainly would be a statutory cubic yard for trenches. Pier holes are not mentioned in that part of the specifications. The concluding paragraph of that provision upon which the respondent laid stress is significant:

"*Estimates* are to be based upon the actual amount of material removed, according to surveys taken from time to time; and upon the completion of the work by a competent engineer employed by the owner."

The *proposals* are to be "based upon the cubic yard" — a statutory cubic yard, of course. When *estimates* are made "from time to time" and at the conclusion of the work, these estimates necessarily must be "*based*" upon the actual amount of material removed; else how could they ever arrive at the statutory cubic yard? The actual amount of material removed first must be ascertained in cubic feet, then all estimates are "based" upon that.

Everything required by those provisions of the specifications necessarily arises in the application of the statute. But the significant part of that passage in the specifications is the making of the estimates "*by a competent engineer employed by the owner.*" The paragraph

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was not put in for the purpose of indicating how measurements should be made, but for the purpose of providing *who* shall make the measurements; so that such measurements shall be under the control of the owner. If it had been intended to provide a "special agreement" for measurements, some language inconsistent with the statute as to what constitutes a cubic yard would have been used. The estimates are for the purpose of making payments, and are made *after* the measurements are furnished. There is no special agreement as to measurements in the specifications.

II. The respondent, however, asserts that the judgment was right because the parties had construed the contract so that pier holes and trenches were to be measured singly and not as provided in the statute. The contract required payments to be made in monthly installments of 85 per cent of the work completed in the building, leaving a balance of 15 per cent of all the completed work unpaid, which balance should be paid when the work was entirely completed and delivered.

Interpretation  
by Parties.

The defendants introduced a number of exhibits showing the estimates and settlements from time to time which they claim shows a construction of the contract according to their theory. There were several of those introduced in evidence and the following illustrate all:

## "Exhibit 'A'"

Oct. 2, 1916.

"Gilsonite Const. Co.

To Webb-Kunze Const. Co., Dr.

"Excavation on Bevo Plant for A. B. B. Assoc., approximately as follows:

Trench Work, 4,500 Cys. at \$1.15 .....	\$5,175.00
Pit Work, 2,700 Cys. at .40 .....	1,080.00
Moving Heman's shovel on job, labor .....	71.05

\$6,326.05"

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## "Exhibit 'B' "

Oct. 20, 1916.

"Gilsonite Const. Co.,

To Webb-Kunze Const. Co.

"Approximate yardage on trench work for

October: 2,000 Cys. at \$1.15 .....	\$2,300.00
Less 15% .....	345.00
	<u>\$1,955.00"</u>

## "Exhibit 'C' "

Nov. 1, 1916.

"Gilsonite Construction Co., Dr.

To Webb-Kunze Const. Co.

"Approximate yardage on Bevo Plant to date:

Trench work, 10,203 cu. yds. at \$1.15 cu. yd. ..	\$11,733.45
Pit work, 2,700 cu. yds. at 40c cu. yd. ....	1,080.00
Pier holes on 7th St., 160 cu. yds. at \$2.00 cu. yd. ....	320.00
	<u>\$13,133.45</u>
Less previous estimate .....	8,528.95
	<u>\$ 4,604.50</u>

"Extras on Pay Roll, week ending Oct. 19 \$119.10

Extras on Pay Roll, week ending Oct. 26 192.92

312.02\$ 4,916.52"

## "Exhibit 'D' "

Nov. 24, 1916.

"Gilsonite Const. Co.,

To Webb-Kunze Const. Co.

"Approximate yards of trench excavates from Nov 1st  
to Nov. 24, 1916.

On 7th Street 130 ft. trench 1430 cu. yds.

On Arsenal &amp; Bway. 90 ft. trench 990 cu. yds.

2420 cu. yds. at \$1.15\$2,783.00"

It will be noticed in each of these statements there was an estimated payment upon the number of cubic yards. The abbreviation in Exhibit A, "Cys." doubtless means cubic yards, as does the word "yardage" in Exhibit B, and the expression "cu. yds." in Exhibit C. There is nothing in these statements to indicate that "cubic yards" means anything else than statutory cubic yards. There is nothing in any dimensions given in



those exhibits which would indicate that the amount of material taken out was in excess of what the statute provides. In "Exhibit D" the length of one trench, and perhaps the width of another, is given, but that is the only dimension. In one of the exhibits (not copied above) two dimensions of some pier holes are given, but in none are three dimensions given. The exact amount of earth removed in cubic feet cannot be determined; nor is there any evidence that the measurements were made and 27 cubic feet allowed for the cubic yards mentioned in these estimates.

Another provision of the contract is important also in considering the effect of settlements, even if the evidence had been more direct in support of respondent's theory. The contract has the following provision:

"Article XXVI. No payment made for work under this contract except the final payment, shall be conclusive evidence of the performance of this contract either wholly or in part, and no payment shall be construed to mean an acceptance of defective work or improper materials."

While that provision is to the effect that no payment shall be conclusive evidence as to *performance*, performance would necessarily involve interpretation of the contract, and it may well be doubted whether the exhibits offered were competent evidence, even if they tended to show what appellant claims.

It is true that the interpretation and construction which the parties themselves place upon a contract will be adopted by the court where the contract is ambiguous. That is, where the terms of the contract are reasonably susceptible of different constructions. [Meissner v. Ry. Equipment Co., 211 Mo. l. c. 133; Produce Co. v. Olsen, 188 Mo. App. 191; Laughlin v. Joplin, 161 Mo. App. 167.] The evidence offered does not in any way tend to show a construction of the contract different from its terms as indicated above.

The judgment is reversed and the cause remanded with directions to the trial court to enter judgment in

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accordance with the prayer of the petition. *Railey* and *Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

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THE STATE v. BEVERLY C. STEVENS, Appellant.

Division Two, March 26, 1920.

1. **INDICTMENT: Embezzlement:—Conversion by Bailee.** Under Section 4552, Revised Statutes 1909, which makes it an offense to convert money or property as a bailee with intent to embezzle it, an indictment charging that at a time mentioned defendant was the bailee of a certain note, describing it, which was owned by a certain other person; that while said note was so held by defendant, he, without the consent of the owner, converted it to his own use; that his intent in so doing was to deprive the owner of the same, and that in the manner aforesaid he did feloniously steal, take and carry away said note, etc., charges every essential element of the crime.
2. ———: ———: **Ownership.** In an indictment charging that defendant unlawfully as bailee converted a note for \$1500 to his own use, it was alleged that the note, executed by Henry Woods, was "payable to the order of" defendant and was "the right of action, valuable security and property of C. C. Sanders," and was "delivered to and came into possession and under the care of" defendant "as bailee aforesaid, of, for and on behalf of C. C. Sanders." *Held*, that the indictment is not bad because it does not allege that the note was indorsed by defendant to Sanders, but the ownership is sufficiently alleged to be in Sanders, and by the words used is more specific in that respect than it would be had it contained an allegation that the note had been indorsed by defendant to Sanders.
3. ———: ———: **Description of Note: Secured by Deed of Trust: Interest.** In an indictment for embezzlement as bailee of a note payable when made to defendant, it is not necessary that it allege that the note was secured by a deed of trust, that it bore interest at the rate of eight per cent after maturity, or that it was payable at the office of defendant. Those things constitute matters of description not necessary to be pleaded under the

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statute, which makes the indictment sufficient if the instrument embezzled is described by any name or designation by which it may be usually known.

4. **OBJECTIONS: General.** Objections to testimony must be specific, and upon an adverse ruling thereon exceptions must be saved; otherwise, they may be disregarded on appeal.
5. **EMBEZZLEMENT: Variance: Accounting: Intent.** Where the crime charged embezzlement of a note by defendant as bailee, proof that, while the note was in defendant's possession only for the purpose of effecting its sale for the benefit of the owner, defendant pledged it to a bank as collateral to secure the payment of his own debt, is competent to prove the intent with which the conversion was committed, and being competent for that purpose it cannot be ruled to have been offered to establish an accounting, and consequently there was no variance.
6. **INSTRUCTIONS: No Specific Assignment.** A motion for a new trial in a criminal case should contain some definite reference to instructions complained of. Assignments that "the court erred in giving instructions upon the request of the State," that "the court erred in the instructions given of its own motion" and that "the court erred in failing to instruct on all the law of the case," are too indefinite to authorize a review of the instructions on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

**AFFIRMED.**

*Fauntleroy, Cullen & Hay* for appellant.

(1) The court erred in permitting the State to show that defendant failed to account for any proceeds of the fifteen-hundred-dollar note, which he was charged with embezzling. *State v. Dodson*, 72 Mo. 283; *State v. Crosswhite*, 130 Mo. 363; *State v. Mispagel*, 207 Mo. 573; 9 R. C. L. 1295. (2) The indictment in this case charges that the note embezzled was made payable to the order of B. C. Stevens, who is the defendant in the case. This is a specific allegation and tantamount to an averment that the defendant was the owner and holder of the note. *First Nat. Bank v. Stallo*, 145 N. Y. Supp. 747; Sec. 10001, R. S. 1909; *State v. Farrington*,

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28 L. R. A. 398. (3) The note introduced in evidence was entirely variant from the note described in the indictment: (a) It was payable at the office of B. C. Stevens, Clayton, Missouri; (b) It bore interest after maturity at the rate of eight per cent per annum; (c) It recited that it was secured by deed of trust of even date herewith; (d) On the back it was indorsed B. C. Stevens. By the endorsement of said note, B. C. Stevens became a party to it and bound as one of the original makers, and this feature, alone, establishes clearly the variance between the note pleaded and the one proved. Not only was objection made to the note on account of this variance, but objection was made to the introduction of the deed of trust which was not mentioned in the indictment, and defendant was placed upon trial, charged with embezzling a note signed by Henry Woods, and as evidence of his guilt the State introduced a deed of trust, which was not mentioned in the indictment, and a note endorsed by B. C. Stevens, which was not mentioned in the indictment, and a note bearing interest, when no mention of interest was made in the indictment. Under the authorities, there was a fatal variance between the allegations in the indictment and the proof. *State v. Owens*, 73 Mo. 442; *State v. McNerney*, 118 Mo. App. 66; *Grant v. State*, 17 So. 225; *Falkner v. Falkner*, 73 Mo. 335.

*Frank W. McAllister*, Attorney General, and  
*Clarence P. LeMire*, Assistant Attorney General, for  
respondent.

(1) The second count is in a form substantially approved by this court. *State v. Betz*, 207 Mo. 589; *State v. Crosswhite*, 130 Mo. 358; *Kelly's Crim. Law & Prac.* (3 Ed.), sec. 677; *State v. Castleton*, 255 Mo. 201. (2) The State was permitted to show over the objection and exception of counsel for the appellant that the name of Beverly C. Stevens was indorsed on the back of the note in question. This was competent. It tended

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to support the allegation in the indictment to the effect that said note was the property of C. C. Sanders. Counsel for defendant also objected to the introduction in evidence of the deed of trust securing said note. Said deed of trust was competent to identify the note. It was a part of the original transaction and had been transferred along with the note in all subsequent transactions. *State v. Burks*, 159 Mo. 568. (3) The motion for new trial contains a general allegation of error in the giving and refusing of instructions. This court has often held that instructions cannot be saved for review in that manner; therefore we shall not encumber this brief with a review of said instructions. *State v. Headrick*, 149 Mo. 396; *State v. Snyder*, 263 Mo. 664; *State v. McBrien*, 265 Mo. 594.

WALKER, C. J.—An indictment preferred to the grand jury of St. Louis County in December, 1914, charged the appellant in two counts with embezzlement; in the first with having unlawfully converted to his own use a certain note for \$1500, the property of one C. C. Sanders; in the second, with having unlawfully, etc., as a bailee, converted said note.

After a removal of the case by change of venue to the Circuit Court of the City of St. Louis a trial was had resulting in a verdict of guilty under the second count and a sentence of three years' imprisonment in the penitentiary. Appellant seeks a reversal of this judgment.

The second count of the indictment is as follows:

"And the grand jurors aforesaid, under their oaths aforesaid, do further present that Beverly C. Stevens, on or about the — day of July, 1913, at the County of St. Louis and State of Missouri, became and was the bailee of a certain right in action and valuable security, to-wit, a promissory note for the sum of fifteen hundred dollars, dated the 17th day of August, 1912, executed by Henry Woods, and payable three years after date to the order of B. C. Stevens, said note being

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of the value of fifteen hundred dollars, the right in action, valuable security and property of C. C. Sanders, which said right in action, valuable security and property was delivered to and came into possession and under the care of the said Beverly C. Stevens as bailee as aforesaid, of, for and on behalf of C. C. Sanders; and the said Beverly C. Stevens, the right in action, valuable security and property aforesaid did then and there feloniously and fraudulently embezzle and convert to his own use, without the consent of the said C. C. Sanders, with the felonious and fraudulent intent then and there to deprive the owner, the said C. C. Sanders, of the use thereof; and so the said Beverly C. Stevens, the said right in action, valuable security and property, of the value aforesaid, the property of the said C. C. Sanders, in the manner and form aforesaid fraudulently and feloniously did take, steal and carry away and convert the same to his own use, against the peace and dignity of the State."

The appellant resided in Clayton, St. Louis County, and was engaged in the real estate and loan business at the time of the alleged offense. In August, 1912, Sanders, the prosecuting witness, purchased from the appellant a note for \$1500 payable on its face to the appellant; the latter endorsed the note and turned it over to Sanders. This note was secured by a deed of trust which was also at the time turned over to Sanders. After holding the note about twelve months, Sanders took it to the office of appellant and left it there to be sold or taken up. Several months elapsed and appellant told Sanders from time to time that he was trying to sell the note, but was unable to find a buyer. In October, 1914, Sanders discovered that the Creve Coeur Farmers Bank in St. Louis County had advertised to sell the note at public sale, and on the 14th day of that month it was so sold and he bought it for the sum of \$1082.50. The evidence discloses that in August, 1913, the appellant had taken the note and deed of trust aforesaid and deposited them as collateral security for money advanced to him by the Creve Coeur Farmers Bank on his per-

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sonal note. This personal note was renewed from time to time between August, 1913, and October, 1914, and a payment or two made, but each time the note and deed of trust in question were deposited as collateral security by appellant to secure the payment of his own note to the bank. It further appears that prior to October, 1914, appellant made an assignment for the benefit of his creditors and that the sale of the collateral note by the bank was to satisfy appellant's debt to it. This was the substance of the testimony on behalf of the State. The defendant offered none.

The points stressed by appellant for a reversal are: defects in the indictment, improper admission of testimony, and errors in instructions.

Stripped of formal averments required in a charge of the nature here under review, the presence of which is not challenged, the essential allegations of the indictment are that at the time stated the appellant was the bailee of a certain note, describing it, which was owned by one C. C. Sanders; that while said note was so held by the appellant he, without the consent of the owner, converted it to his own use; that his intent in so doing was to deprive the owner of the same; and that in the manner aforesaid appellant did feloniously steal, take and carry same away, etc.

I. The count of the indictment under which the appellant was convicted was based upon Section 4552, Revised Statutes 1909. This statute, as we held in *State*

*Indictment.* v. Burgess, 268 Mo. 413, creates two offenses; one for embezzlement as bailee, and the other for converting or making away with money or property as a bailee with intent to embezzle it. The offense as charged in the count under which appellant was convicted is for an actual embezzlement as bailee, and the intent pleaded is nothing more than a defining of the wrongful act with a felonious purpose necessary in any criminal charge. All of the averments essential to charge the offense are embodied therein. It is even more specific than is required under the Statute of Jeof-

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fails (Sec. 5108, R. S. 1909) applicable to indictments for offenses of this character, and from it no difficulty is encountered in ascertaining the nature and cause of the accusation. It follows with exactness as to material averments the form approved in *State v. Crosswhite*, 130 Mo. 358, and, free from the defects noted in the *Burgess* case, *supra*, it complies with the requirements held therein to be necessary in framing a charge of this nature.

A more specific contention as to the insufficiency of the indictment is urged in that it alleges that the note was made payable to the appellant or his order, but does not aver that it was indorsed by him to Sanders; that on its face the ownership of same was in the appellant, who could not be held to have embezzled his own property. It is insisted in support of this contention that the indictment should have, in addition to the description it contained of the note, the further averments that the note was payable at the office of the appellant; that it bore interest at the rate of eight per cent per annum after maturity, that it was secured by a deed of trust of even date therewith and that the name of the appellant was indorsed on the back thereof. The context of the indictment furnishes a satisfactory answer to the contention as to the allegation of ownership. In addition to the averment that the note was made payable to the appellant or his order, it is alleged that the right of action on said note and the property in same was in C. C. Sanders. This is even more specific than if it had been alleged, as it is contended should have been done, that the note had been indorsed by the appellant to Sanders. So far, therefore, as concerns the allegation of ownership it is sufficient to meet the requirements of a pleading of this character and to render the note subject to embezzlement by the appellant.

As to the further description of the note which it is contended should have appeared in the indictment, it will be sufficient to say that it constituted matter of description not necessary under our statute to be pleaded. This statute, to which we have heretofore referred, Sec-



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tion 5108, *supra*, provides, among other things, that in any indictment for embezzling any instrument it shall be sufficient to describe the same by any name or designation by which it may be usually known or by the support thereof, without setting out any copy or facsimile thereof or otherwise describing the same or its value. In ruling upon this statute in *State v. Clinton*, 67 Mo. 382, and in *State v. Carragin*, 210 Mo. 371, we held that if the indictment contains enough to notify the defendant of the charge against him, such minuteness of description as is contended for in the case at bar may be dispensed with. To a like effect are the cases of *State v. Sharpless*, 212 Mo. 202, and *State v. Jackson*, 221 Mo. 506, which, in construing the statute, Section 5108, *supra*, are also determinative of the sufficiency of the indictments, holding that the descriptions by their purport of the instrument therein did not constitute such variances between the charges and the evidence offered in proof thereof as to be material to the merits and hence were not prejudicial to the defendants.

Although the crime with which the appellant is charged in this case is statutory (*State v. Burgess*, 268 Mo. 407) and hence must be so charged as to specifically bring the accused within its terms, the description of the note in the indictment was sufficient to comply with this requirement, in that nothing was left to implication or intendment. There is no merit, therefore, in appellant's contention in this behalf.

II. The contention is also made that there was a variance between the crime charged and that proved. On technical grounds we would be authorized in disregarding this objection in not having been preserved in such a manner as to entitle it to consideration. We have repeatedly held that objections to testimony must be specific and upon an adverse ruling thereto counsel must save exceptions. When the State offered to prove that appellant had in no way accounted to Sanders for the note a formal objection was made by counsel and sustained by the court. Upon a

more general inquiry in regard thereto counsel for appellant contented himself with remarking: "We are not charged with a failure to account." This was simply an expression of opinion as to the relevancy of the testimony and when the court said, "He may answer," no effort was made to save an exception and thus challenge the correctness of the ruling. However, if this irregular and, as we view it, insufficient manner of objecting to the introduction of testimony and the saving of exceptions be waived, there is no merit in the contention. The crime charged was the embezzlement of the note by the appellant as a bailee; the proof showed that while it was in his possession only for the purpose of effecting its sale for the benefit of the owner, appellant pledged it to a bank as collateral to secure the payment of his own debt. Testimony introduced, therefore, that he had not accounted for the note was admissible if for no other purpose than to show the fraudulent and unlawful character of the transaction or the felonious intent with which the act was committed. The relevancy of testimony of the character here complained of was discussed by us in *State v. McWilliams*, 267 Mo. 456, as it had been in a number of earlier cases; while not ruling upon its admissibility, which was conceded, we held it sufficient proof of a felonious intent to sustain a verdict of guilty. It is apparent that the objection to the testimony complained of is based upon an erroneous conclusion as to the purpose of its admission, which was not to prove the crime, but the intent with which it was committed; admissible for that purpose, it constituted no variance and hence the contention of appellant is devoid of merit. The cases cited in support of the contention are not parallel in their facts with those in the case at bar and hence have no ruling effect in this matter. We refer to *State v. Mispagel*, 207 Mo. 573; *State v. Crosswhite*, 130 Mo. 358; *State v. Dodson*, 72 Mo. 283.

III. Appellant complains of the instructions. The error thus assigned is sought to be preserved in the motion for a new trial as follows:

**Instructions.**

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"Because the court erred in giving instructions to the jury upon request of the State.

"Because the court erred in giving instructions given upon the court's own motion.

"Because the court erred in failing to instruct the jury on all the law of the case.

"Because the court erred in refusing the instructions offered and requested by defendant.

"Because the court erred in giving instructions requested by defendant in a modified form."

These sweeping averments afforded the trial court no opportunity—as is the purpose of a motion for a new trial—to correct the errors now contended by the appellant to inhere in the instructions. As much would have been expressed and the trial court equally enlightened if, instead of the several averments, one had been employed which alleged that the court erred in giving and refusing instructions. The statutory mandate (Sec. 5312, R. S. 1909) that we shall in criminal cases, regardless of assignments of error, render judgment upon the record before us, means such a record of the trial as is required by our rules of procedure to be preserved for our review. We have repeatedly ruled that motions for new trials in criminal cases should, if instructions are complained of, contain some definite reference thereto although it extends no further than a numerical reference to such instructions (State v. Othick, 184 S. W. 106; State v. Gilbert, 186 S. W. 1003; State v. Gifford, 186 S. W. 1058; State v. Miller, 188 S. W. 87; State v. Fleetwood, 190 S. W. 1; State v. Harris, 245 Mo. 445; State v. Snyder, 263 Mo. l. c. 668; State v. Rowe, 196 S. W. 7; State v. Katz, 266 Mo. 493; State v. Levy, 262 Mo. 181; State v. Hammontree, 177 S. W. 367; Polski v. St. Louis, 264 Mo. 458; State v. Lewis, 273 Mo. 532); this is but fair to the trial court and is no wise prejudicial to the defendant. A compliance with this requirement, as we held in State v. McBrien, 265 Mo. l. c. 604, and in State v. Selleck, 199 S. W. 129, is within the statutory injunction (Sec. 5285, R. S. 1909) which provides that a motion for a new trial "shall set forth the

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grounds or causes therefor." There is no reason why the rule should not have been observed in this case. A failure so to do precludes an examination of the instructions, which we are authorized in presuming correctly declared the law.

The facts present no extenuating circumstances in this case; as a consequence no defense was interposed to the merits. The appellant, indifferent to the trust reposed in him by the owner of the note, deliberately converted it to his own use by pleading it as collateral to secure a personal debt and now seeks solely through the interposing of technical objections to the manner of his trial to escape the consequences of his crime. None of these have we found of such materiality as to authorize an interference with the judgment of the trial court, which is therefore affirmed. All concur.

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CHARLES MUSSER et al., Appellants, v. CARRIE  
MUSSER et al., Respondents.

Division Two, March 26, 1920.

1. **COMMON LAW: Pleading: Effect.** The effect of the statute of Kansas which provides that "the common law as modified by the constitutional and statutory law, judicial decisions, and the conditions and wants of the people shall remain in force in aid of the general statutes of this State" extends no further than to assert the common law to be there in force as therein stated, and to render unnecessary any presumption that might otherwise obtain an account of that State not having been carved out of the original territory subject to the law of England. Considered in any other sense, the pleading of the statute is a mere conclusion.
2. ———: **Definition: How Pleaded.** The common law is not "a true body of law" in the sense that it is collected into a code or any particular book; but it began in statements and principles announced in decisions of courts, which have been multiplied and modified by subsequent decisions, until they are regarded as accumulated and approved expressions of what is right and just. In this country, the common law is inseparably identified with judicial decisions, and what is the common law of any particular

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state is to be ascertained by an examination of its decisions, as precedents; and where an attempt is made to plead the common law of another state, the rules of decision of the courts of that State, as applicable to the particular case, are the things to be alleged, as the basis of the action. It is not sufficient to plead what counsel may think is the common law of the foreign state, but it, as well as its violations, must be pleaded with distinctiveness, as any other substantive fact.

3. ———: **Pleading: Conclusions.** In pleading the decisions of another state from which the common law therein is to be determined, pertinent parts of such decisions should be alleged, in order to avoid the charge of stating mere conclusions. If the common law of such foreign state is the basis of recovery or the constitutive fact of plaintiff's case, mere conclusions as to what counsel may think the decisions of its courts may mean will not suffice.
4. ———: ———: ———: **Private Charity.** In a suit to construe a will, devising property in Kansas and probated in that State, the will was alleged to be invalid for that it attempted to create a private charity, in violation of the common law in force in that State, and the petition, after a general averment "that the common law in force in Kansas is and was in part at all times mentioned as follows," proceeded, in several paragraphs, in some of them arbitrarily and in others argumentatively, to state what is alleged to be the law of Kansas relating to wills and charities and the powers and duties of the donee (a school district) in reference thereto, but alleging nothing either affirmative, definite or precise as to what is the actual common law of the State. *Held*, that it is essential that the common law of Kansas itself, as found in the court decisions of the State, be pleaded as any other fact, and the petition is not good as against a general demurrer.
5. ———: ———: ———: **Ultimate Facts.** A petition, in stating the ultimate facts in regard to the common law of another state, relied on as the basis of the action, and not the law itself, is not sufficient. Ultimate facts are nothing more than issuable, constitutive or traversable facts essential to the statement of a cause of action, and are not mere conclusions as to what the facts are.
6. ———: ———: **Demurrer: Admissions.** A general demurrer to a petition does not admit conclusions of law. Where the petition simply contains general averments as to what the common law of another state is, but does not plead that law itself as facts, a demurrer to it that it does not state facts sufficient to constitute a cause of action does not admit the common law of the State to be what the averments allege it to be.

7. ———: ———: **Private Charity: Gift for Educational Purposes.**

The Supreme Court of Kansas has never decided that every public charity must be such as the State may lawfully maintain by public taxation. Therefore, an allegation in the petition to construe a will by which property was bequeathed "for the purpose of creating an endowment for the education of worthy young men and woman of a school district" in a named county, "preference to be given to those who are orphaned," that the will attempted to create a private charity, and that the gift was void because the object was not one which "the State itself ought and lawfully might endow and support with public resources," does not and cannot state a cause of action, because there are no decisions of that State so holding.

Appeal from Clay Circuit Court.—*Hon. Frank P. Divelbiss*, Judge.

**AFFIRMED.**

*Carl G. Wagner, Frank T. Burnham, Frank W. Yale, and Ernest S. Ellis*, for appellants.

(1) The will, by its terms, refers to and provides that it shall be construed under the laws of the State of Kansas. This reference and provision makes the law of Kansas as much a part of the will as though it had been inserted *verbatim* therein. *Shulsky v. Shulsky*, 98 Kan. 69; *Chambers v. McDaniel*, 28 N. C. 229; *Vestry v. Bostwick*, 8 App. B. C. 456; 40 Cyc. 1094, notes. (2) The trust sought to be created by the will is not a public charity, and is void on its face, under the laws of the State of Kansas, as being against the rule prohibiting perpetuities of title in estates, because the fund provided can only be used for the benefit of certain persons to be selected and certified by the "school board" from a classification of individuals, which does not arise in the course of nature, but is wholly arbitrary and grows out of and only exists in the "private conventions, class associations and artificial distinctions of men." *Troutman v. DeBoissiere*, 66 Kan. 1. (3) The power to appoint and certify beneficiaries sought by said will to be conferred upon the

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“school board” cannot be exercised. Its powers are fixed by statute and it cannot be the recipient of or exercise any power sought to be conferred upon it by an individual. Hence, the intended beneficiaries of the trust cannot be legally ascertained and determined. *Harwood v. Tracy*, 118 Mo. 637; *Dodson v. Scruggs*, 47 Mo. 285; *Re Hoffer's Estate*, 70 Wis. 407; *Leman v. Sherman*, 117 Ill. 657; *Sinking Fund Commrs. v. Walker*, 6 How. (U. S.) 143; *Shaw v. Payne*, 12 Allen (Mass.) 293; *Dunbar v. Soule*, 129 Mass. 284; *McClary v. McLain*, 2 Ohio St. 368; *English v. Sailors' Snug Harbor*, 3 Pet. (U. S.) 99; 1 *Perry on Trusts*, sec. 296; 35 *Cyc.* 899 et seq.; 39 *Cyc.* 272, and notes; 28 *Am. & Eng. Ency.* (2 Ed.) 965; 12 *Am. & Eng. Ency.* 301. (4) But even if such power of appointment could be conferred upon the “school board” the provisions of the will are incomplete and insufficient to permit action thereunder, because no standard or measure of the required qualifications of beneficiaries is provided, and no means or method is named by which the facts necessary to be certified may be ascertained. In *re Hauck*, 70 Mich. 410; *Fountaine v. Ravenel*, 19 How. (U. S.) 368; *Beckman v. Bonsor*, 23 N. Y. 298; *Grimes v. Harman*, 35 Ind. 220; *Gallego's v. Atty. Gen.*, 3 Leigh, 450; *Dashiel v. Atty. Gen.*, 5 Har. & Johns. 392; *Hughes v. Daly*, 49 Conn. 34; *Lepage v. McNamara*, 5 Iowa, 124; *White v. Fisk*, 22 Conn. 31. (5) The trust attempted to be created by the will cannot be sustained as a public charity because the State and the public, through its courts, possess no “admitted right of visitation and control.” *Troutman v. DeBoissiere*, 66 Kan. 1. On the contrary the will by its terms expressly precludes the courts from the exercise of such right and power.

*Dwight M. Smith and Goodwin Creason* for respondents.

(1) The attack upon the will in question being predicated upon the laws of Kansas, and no laws of

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Kansas that affect the validity of the will being pleaded, the amended petition of plaintiff below stated no cause of action, and demurrer was properly sustained. *Gibson v. Railroad*, 225 Mo. 485; *Rialto Co. v. Minor*, 183 Mo. App. 128; *McDonald v. Life Assn.*, 154 Mo. 628; *Lee v. Mo. Pac.*, 195 Mo. 415; *Coleman v. Lucksinger*, 224 Mo. 14; *Ginnocchio v. Railroad*, 155 Mo. App. 168; *State v. Harty*, 208 S. W. (Mo.) 837. (2) Since plaintiff's amended petition alleges the common law to be in force in Kansas, and pleads no statute or decision of Kansas modifying it, a Missouri court in construing the will in question must presume the common law of Kansas to be the same as the common law of Missouri, as found in its own decisions. *McPike v. McPike*, 111 Mo. 226; *Kollock v. Emmert & Co.*, 43 Mo. App. 570; *Jordan v. Pence*, 123 Mo. App. 324; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 525; *Bank v. Com. Co.*, 139 Mo. App. 124. (3) The will in question, under the laws of Missouri, creates a public charity of the most unimpeachable character. *Crow ex rel. v. Clay County*, 196 Mo. 261; *Catron v. Scarritt Collegiate Institute*, 264 Mo. 725; *Robinson v. Crutcher*, 209 S. W. (Mo.) 104; *Strother v. Barrow*, 246 Mo. 241; *Sandusky v. Sandusky*, 261 Mo. 357; *Hadley v. Forsee*, 203 Mo. 426; *Buchanan v. Kennard*, 234 Mo. 139; *Buckley v. Monck*, 187 S. W. (Mo.) 34; *Cummings v. Dent*, 189 S. W. (Mo.) 1161; *Sappington v. School Fund Trustees*, 123 Mo. 32; *Anderson v. Roberts*, 147 Mo. 486; *Lackland v. Walker*, 151 Mo. 257; *Chambers v. St. Louis*, 29 Mo. 543; *Howe v. Wilson*, 91 Mo. 45; *Powell v. Hatch*, 100 Mo. 592; *Barkley v. Donnelly*, 112 Mo. 561; *Missouri Hist. Society v. Academy of Science*, 94 Mo. 466. (4) The will is equally valid under Kansas statutes and decisions, as well as general law relating to charitable trusts. *Troutman v. DeBoissiere*, 66 Kan. 1; *Washburn College v. O'Hara*, 75 Kan. 700; *Keeler v. Lauer*, 73 Kan. 393; Secs. 9850, 9840, 9841, 7443, 7445, Statutes of Kansas 1909; 5 R. C. L. 309; 11 C. J. p. 361, sec. 20. (5) Since the will creates a valid public charity,



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and provides competent trustees to take title, the heirs-at-law have no interest in the estate, and the plan provided in the will for designating beneficiaries does not concern them. *W. C. A. v. Kansas City*, 147 Mo. 103; *Academy of Visitation v. Clemmens*, 50 Mo. 167; *Crow ex rel. v. Clay County*, 196 Mo. 261; *Sandusky v. Sandusky*, 265 Mo. 234; *Glaze v. Allen*, 213 S. W. 785; *Mott v. Morris*, 249 Mo. 147; *Barkley v. Donnelly*, 112 Mo. 570; *Harwood v. Tracy*, 118 Mo. 631; 5 R. C. L. 299, 309, 370; 11 C. J. 342.

WALKER, C. J.—This action was brought in the Circuit Court of Clay County to obtain a construction of the will of Benjamin Musser. A demurrer to the petition, which alleged that it did not state facts sufficient to constitute a cause of action, was sustained. Refusing to plead further, a judgment was entered against the plaintiffs, who thereupon appealed to this court.

The property devised was located in Jewell County, Kansas. The will provided for the probating of same in that county and that it was to be construed under the laws of that State.

The petition alleged the invalidity of the will in that by its terms it created a private charity, in violation of the common law in force in Kansas applicable thereto, and was hence void. The sufficiency of the petition is assailed as to the manner in which it pleads the existence of the common law in that State.

Under Section 9850, General Statutes of Kansas 1909 (Dassler), set forth in the petition, it is provided that "the common law as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of this State."

The effect of the pleading of this section extends no further than to declare the common law in force in Kansas as therein stated, and to render unnecessary any presumption that might otherwise obtain on account of that State not having been carved out of the

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original territory subject to the law of England. Considered in any other sense the pleading of this statute is a mere conclusion. [Gibson v. Railroad, 225 Mo. 473.]

Other sections of the statutes of Kansas pleaded are irrelevant to the determination of the matter at issue.

The manner in which the common law is pleaded is as follows:

“That the common law in force and in effect in the State of Kansas is and was, at all the times herein mentioned, in part as follows:

“That where a conveyance or will attempts to create and vest property in trust in perpetuity in trustees and their successors for the benefit of beneficiaries therein designated, the instrument is void on its face as violating the rule against perpetuities of title in estates, unless the trust so attempted to be created constitutes a public charity.

“The beneficiaries of a valid public charity must partake of a quasi-public character. The public must be under obligations to them as a class; as a class they must have some claim upon the public and that claim must be one founded in nature and cognizable by the instincts of a common humanity; it cannot be one growing out of or existing in the private conventions or class associations or artificial distinctions of men. Public charities may be restricted to a particular class in the State or of its municipal divisions, but they must be general for all the designated class within the particular municipality. Such classification must be based on some obvious natural distinction, having reference to the merits hoped to be attained. It must not be arbitrary or artificial. The class must stand in a natural and meritorious relation to the public at large. A gift for a general public use must be for an object which the State itself ought or lawfully might endow and support with public resources.

“The rule against perpetuities was devised to prevent the perpetual entailment of estates and to give them over to free conveyance. That rule should not be

relaxed except in the interest of the general public, and it is not relaxed except where the public itself holds the title and is the trustee, or, if not holding the title and acting as the trustee, possesses an admitted right of visitation and control.

"The right and power of visitation on the part of the State is lodged in the courts having equitable jurisdiction, to be exercised at the instance of the Attorney-General of the State, and unless the trust be of such a nature as that the Attorney-General might bring an information in the courts to enforce its administration it cannot be a public charity.

"In the State of Kansas, the public duty which the Attorney-General may sue to enforce, or the public wrong which he may sue to prevent, must be a duty or a wrong affecting the whole community or affecting the community in general, or a matter affecting the interests of the entire public. A charity which the Attorney-General of the State of Kansas can sue to enforce or conserve must be a charity of a character so public as to interest the whole community—the community in general—the entire public."

I. Remote as the inquiry may seem upon a superficial consideration of the subject, the question as to what is meant by the "common law in force in Kansas" demands solution before it can be intelligently determined whether the petition is, as was held by the trial court, fatally defective in not properly pleading that law.

The opinions of many of our courts of last resort, including our own, state generally that the common law "imports a system of unwritten law not evidenced by statute, but by traditions and the opinions and judgments of the sages of the law." The Supreme Court of the United States has in several instances (*West. U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Kansas v. Colorado*, 206 U. S. 1. c. 96) answered the inquiry by quoting the language of Kent (1 Com. 471) that "the common law includes those principles, usages and rules

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of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature." These definitions afford us little aid in the present inquiry. In what manner is it to be determined according to any definite and uniform plan which will serve as a rule for judicial guidance, what the "traditions" are and who are the sages "whose opinions and judgments" are to enlighten us as to what constitutes the common law? If "principles, usages and rules of action" are to afford the required enlightenment, in what do these essentials consist, from what sources are they to be derived and how is their uniformity to be determined in any particular case?

There is, says Mr. Justice EWART in effect in discussing this question (40 Can. L. J. 95), "a short way of settling it. If there was or is any true body of law known as the Common Law, apart from the decisions of the courts, let him who asserts the fact quote or otherwise refer us to a single item of it. The *Leges Barbarorum* we know; the laws of Justinian we know; the laws of the Twelve Tables (B.C. 509) we know; even the laws of Hammurabi of Babylon (B. C., say 2250) we know, and can quote from. Will somebody please furnish us with an extract from the 'Common Law of England'?

"Surely this can easily be done. Go to the law reports and read to us. The judges, if they were deciding according to this 'true body of law,' will undoubtedly so indicate. No, these modern judges seem to know nothing of it. Open, then, these musty old Year Books; thumb them all. No? Try the Rolls—back as far as John's reign. Nothing there? Well, don't despair; in the works of Bracton (Chief Justiciar of England 1265-1267) or in those of Glanvil (the oldest writer on English jurisprudence, and Chief Justiciar of England in the reign of Henry II) there must be some trace of this 'true body.' Not a word?

"Well, where did these judges and writers get the law that they tell us of? Mr. Justice McCLAIN would answer:

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“ ‘By ascertaining what it was customary for English judges to decide in like cases. The reading of Bracton, himself, beyond the introductory pages, proves conclusively the fact. . . . He refers to decisions of the courts, although he is compelled to do so from current or personal knowledge, as reported decisions were as yet apparently unknown, and instead of announcing general principles, borrowed from any code, or pandects, or digests, he tells what was decided in an assize of mort d’ancestor, &c. . . . His successors were the digesters and abridgement-makers—Fitzherbert and Brooke and Rolle and Viner—and these men concerned themselves with the decisions of the English judges and prepared the way for Coke and Hale and Blackstone, the great expounders of the distinctively English system of law.’ [Address, American Bar Assn., 1902.]

“If I am to be told that nobody says that anybody can give extracts from the Common Law, and that what is meant is that the Common Law consisted of certain well known principles upon which the decisions were based, then I ask profert of one of these principles. And if it be alleged that production is impossible, for that the said principles were in the mind or heart, or consciousness, of the people, and not otherwise or elsewhere, I still require at least a hint as to what they looked like before believing in their corporeality.”

Prior to the appointment by William I. of a Chief Justiciar, who was a permanent judicial officer, having supreme jurisdiction throughout England, there may have been in existence customs and usages by which law was crudely administered by the Saxon local folk courts, but when professional judges were created, which followed the appointment of the judicial officer, they at once commenced to reduce the tangle of customs and usages to order and to construct that system which has for its ultimate aim the ascertainment of rules which shall regulate human relations in accordance with the common sense of right. [Nature of Positive Law, Lightwood.]

The Supreme Court of the United States in the case of *Kansas v. Colorado*, *supra*, at page 96, after quoting the passage from Kent referred to, declares the true rule in regard to what constitutes the common law, to this effect: "that it does not rest on any statute or other written declaration of the sovereign, but there must, as to each principle thereof, be a first statement. These statements are found in the decisions of courts and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For, after all, the common law is but the accumulated expression of the numerous judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."

Mr. Lightwood, in his learned treatise on the Nature of Positive Law (p. 359), says that "all law is made either directly by way of statute or obliquely by judicial decision. These are decided to be the only modes in which law can be made. Hence it does not exist by virtue of being customary to or in accordance with legal opinion or with natural law."

Mr. Pomeroy says "that the initial activity in creating the common law of England was done not by Parliamentary legislation, nor by royal decrees, but by the justices in their decisions of civil and criminal causes." [Eq. Juris. sec. 13.]

Says Mr. Austin, after reviewing the entire subject: "There can be no law without judicial sanction and until a custom has been adopted as a law by courts of justice it is always uncertain whether it will be sustained by that sanction or not." [II Lectures on Juris., p. 504.]

Thus it will be seen that the common law in this country is inseparably identified with the decisions of the courts. "Even if we were to assume that the adoption of the common law of England means the adoption of a single system or one uniform and consistent set of principles, usages and rules of action applicable to the government and security of persons and property, we are yet forced to recognize that each of the separate

states has adopted the common-law principle of the authority of precedent, and acts on the theory that what its courts decide is the real common law governing each question passed on." [Pope, Com. Law in U. S. 24 Harv. L. R. 12.]

If, therefore, we are to continue to recognize the authority of precedent, it is essential in determining what the common law is in respect to any question, to refer to the decisions of the courts of last resort therein. These, if sufficiently comprehensive, are decisive of the case. Precedents elsewhere established by courts under the common-law system, whether in England or one of our States, may serve as guides to a court in the absence of its own former rulings, in determining what the applicable principle of the common law is in a given case. Further than this their province is purely persuasive and they rise to the dignity of rulings in a particular jurisdiction only when given judicial sanction. When, therefore, it is pleaded, as it is in the case at bar, that the matter at issue is to be determined by the common law in force in a particular jurisdiction, we ascertain what that law is by an examination of the decisions of the courts. Their importance in the determination of the question is thus made manifest, and is emphasized where, as here, the law invoked is substantive or forms the basis of the action. Where this is true the pleading of the law becomes an essential averment. [Hazelett v. Woodruff, 150 Mo. 539, 51 S. W. 1048; Clark v. Barnes, 58 Mo. App. 672; Bancho v. Gregory, 9 Mo. App. 104; Mystic Legion v. Brewer, 75 Kan. 734.]

II. The general rule, leaving out of consideration for the moment any distinction between the manner in which the common or the statute law of a State is to be pleaded, is that where one relies upon the law of another State to sustain his cause of action, he must not only state with distinctness what that law is, as in pleading any other substantive fact, but also the facts which constitute its violation, that the court may be enabled to judge of its effect. Mere con-

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clusions as to what counsel may think the law means will not suffice. [Wentz v. Railroad, 259 Mo. 450, 168 S. W. 1166, 40 Ann. Cas. 317; Gibson v. Railroad, 225 Mo. l. c. 483; Coleman v. Lucksinger, 224 Mo. l. c. 14.] In pleading decisions of other States from which the common law therein is to be determined, to avoid the charge of stating mere conclusions, pertinent parts of such decisions should be alleged. [Miller v. Chinn, 195 S. W. l. c. 554; Malott v. Harvey, 204 S. W. 940; Lillard v. Lierly, 200 Mo. App. 144, 202 S. W. 1057; Ginnochio v. Railroad, 155 Mo. App. l. c. 168; 9 Ency. Pl. & Pr. 543.] These cases sufficiently announce the rule in this jurisdiction and it is not deemed necessary to burden the opinion with like rulings from courts of last resort elsewhere. While the rule as to what constitutes a sufficient pleading of a foreign law when the same is a constitutive fact in a case, may be deduced from the foregoing statement of general principles, illustrations drawn from adjudicated cases afford more definite criteria as to the distinctive differences between conclusions and direct and positive statements of fact.

In *Wabash Railroad Co. v. Hassett*, 170 Ind. l. c. 376, the Supreme Court, in ruling upon a demurrer to the petition, had under consideration the following allegation as to the common law of Illinois: "That by the common law of the State of Illinois on October 13-14, 1905, employees of railroad corporations operating lines of railroad in such State were fellow-servants only when such employees were brought together in direct co-operation in the performance of a particular work at the time, etc." "This," said the court, "is manifestly no declaration as to what the common law of Illinois was upon the dates named; but, without setting out the substance of such law with regard to fellow-servants, the pleader has interpreted it for himself and merely alleges his conclusion as to its legal effect. This allegation is insufficient as against a demurrer for want of facts."

In *Phinney v. Phinney*, 17 How. Pr. 197, it was alleged that "under the laws of Spain a person became seized of certain real estate." In ruling upon a demur-



rer to the complaint the Supreme Court said: "This kind of statement involves a mere conclusion or inference, in which the plaintiffs, it will be readily seen, may be greatly mistaken. In effect it expresses an opinion of the law and asks the court blindly to adopt it, without giving the court the necessary materials to test its correctness. Foreign laws are mere facts, and, like other facts, must be set forth and proved." The demurrer was sustained.

In *Cubbedge & Co. v. Napier*, 62 Ala. 518, the averment that at the time of the execution and delivery of a note and mortgage under and by virtue of the laws of Georgia, "all title to property made as a part of a usurious contract or to evade the usury laws of the State are void," was held bad as not being an averment of fact, but a conclusion of the pleader.

In *Lomb v. Pioneer S. & L. Co.*, 96 Ala. 430, 11 So. 154, an averment that a note and contract were according to the laws of Minnesota legal, valid and non-usurious and that it is provided by the law of that State that premiums taken for loans made by a building and loan association shall not be considered or treated as interest, nor render such associations amenable to the usury laws, is bad because it is a statement of a conclusion and not of a fact.

In *Templeton v. Sharp*, 10 Ky. L. Rep. 499, 9 S. W. 696, an allegation that the legal rate of interest in another State is ten per cent and that the stipulation in a note to pay that rate is lawful and enforceable, is bad, in simply stating the pleader's conclusion.

In *Thomas v. Gr. Tr. R. Co.*, 1 Penne. (Del.) 593, 42 Atl. 987, a plea in an action against a carrier for non-delivery of goods which states facts alleged by plaintiff to be in violation of the the custom laws of Canada and alleges that by reason thereof the goods were seized in transit, is bad in not setting out the terms of the foreign law. More definite even that the foregoing is the ruling of the Supreme Court of Alabama in *Forsyth v. Preer*, 62 Ala. 443, that a general statement of a foreign law is

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insufficient, it being essential that the law itself be substantially pleaded as any other fact.

There is a line of cases of which *Angell v. Van Schaick*, 132 N. Y. 187, is a type, which holds in pleading the construction of the laws of another State by its courts, that the facts on which the decision is based need not be set out, nor the title of the case, or when it was rendered; these cases hold in addition, however, that it must be distinctly averred what the courts of the State did decide in construing the law. While no specific ruling on the exceptions noted in the *Angell* case has been made in this jurisdiction, it seems more in accord with that certainty and precision of pleading required by our code, that in addition to a specific statement of the facts as to what the law of the other State is, a direct reference should be made to where the court's ruling may be found.

III. Aided by the foregoing cases, to which others of like import might be added but for the risk of unduly lengthening this opinion, we come to a consideration of that portion of the petition at bar upon which plaintiffs

base their cause of action. After a general  
**This Petition.** averment "that the common law in force and in effect in the State of Kansas is and was in part at all the times mentioned as follows," several paragraphs are added which set forth sometimes abstractly and at other times argumentatively what is alleged to be the law of Kansas relating to wills and charities and the powers and duties of members of school boards. Other than the initial sentence quoted there is nothing either affirmative, definite or precise in these averments. The rule applicable to all allegations of this character that they shall be so framed as to inform the court what the foreign law is, where it may be found and the facts which constitute its violation, is in no sense complied with. [*Am. Bank v. Lang*, 2 N. D. 66, 49 N. W. 414; *Armendiaz v. De La Serna*, 40 Tex. 291; *Dunham v. Holloway*, 2 Okla. 78, 41 Pac. 140; *Stockton v. Lehigh*, 14 Phila. 77.] As we said in effect in a well considered opinion by BLAIR, J.,

in *Furlong v. German-Am. Press Assn.*, 189 S. W. 385, the language employed, constitutes but bald allegations of the petition and hence insufficient to properly plead the Kansas law. If enough affirmative allegations could be gleaned from these statements to enable it to be determined therefrom what the law relied upon is, we would not feel authorized in holding the pleading insufficient, although otherwise encumbered with statements couched in the form of legal conclusions, but allegations of the character required do not appear. [*State ex rel. Peet v. Ellison*, 196 S. W. (Mo.) 1103; *State ex inf. v. Armour P. Co.*, 265 Mo. l. c. 144.]

The contention that the petition is sufficient in its stating what the ultimate facts are in regard to the law relied upon, despite the fact that it may contain the **ultimate facts** stated, involves a contradiction apparent to anyone familiar with legal terminology, and hence without merit. Ultimate facts are nothing more than issuable, constitutive or traversable facts essential to the statement of the cause of action; if these had been pleaded, the petition would have been free from the designated defects. [*Caywood v. Farrell*, 175 Ill. 480, 51 N. E. 775; *Read v. State Ins. Co.*, 103 Ia. 307, 64 Am. St. Rep. 180; *Meyer v. School Dist.*, 4 S. D. 420, 57 N. W. 68; 1 *Estes' Pl.*, sec. 190.] It is scarcely necessary to add that it is axiomatic that legal conclusions cannot be pleaded as ultimate facts (31 Cyc. 70).

Furthermore, contention of plaintiffs that defendants have admitted the existence of the common law of Kansas as to what constitutes a public charity is not tenable.

**Admissions.** It is elementary that the admissive force of a demurrer has no application to conclusions of law. [*State ex rel. v. Harty*, 208 S. W. l. c. 837; *Maniaci v. Ex. Co.*, 266 Mo. l. c. 642.]

IV. Our holding that the failure of the petition to state a cause of action in so far as it attempts to plead the common law of Kansas relied upon by plaintiffs, is

sufficient to authorize an affirmance of the judgment herein. [Mallinckrodt Chem. Wks. v. Nemnich, **Kansas** 169 Mo. l. c. 397.] We have in addition, however, reviewed the decisions of the Supreme Court of that State to determine if, under a proper pleading, plaintiffs' contention could be sustained. The only case the language of which lends support to plaintiffs' contention is that of Troutman v. DeBoissiere, 66 Kan. 1. While there is language in the opinion in that case declaratory of the conclusions employed by plaintiffs, we find upon an analysis that it is largely *arguendo* or an expression of the views of the judge writing the opinion. The decisive issue in that case was subsequently discussed and determined by the Supreme Court of that State in Washburn College v. O'Hara, 75 Kan. l. c. 702.

The residuary clause of the will in the Washburn case was assailed on the ground that it created a trust which was not a public charity. Troutman v. DeBoissiere was cited as being directly in point and controlling upon this question. The Supreme Court of that State in ruling thereon in the Washburn case said: "The argument of the defendants in error is founded chiefly upon a statement in that opinion which reads: 'A public charity is a gift to a public object which the State itself, with public resources, should, or lawfully might, foster.' This proposition does not appear in the syllabus and is not the question upon which the court divided. It cannot be said, therefore, that the court intended to decide that every public charity must be such as the State may lawfully maintain by public taxation. The real point decided was that in the trust there being considered the beneficiaries were limited to such an extent that the gift could not be regarded as a public charity. The statement was used in the opinion by way of an argument to illustrate the general scope and extent of a trust which may be properly classed as a public charity. In that case the fund provided could only be used for the benefit of the orphans of deceased Odd Fellows of the State of Kansas.

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This limitation excluded it from the category of public charities."

The will in the Washburn case in a residuary clause bequeathed the remainder of the testator's estate in trust to the trustees of an incorporated educational institution, to be held by them as a perpetual fund for the higher education of young men to be selected by trustees for the Christian ministry. It was held that such a bequest created an educational trust which is a public charity. There are no other rulings of the Supreme Court of that State as to the adoption of the common law applicable to the facts in the instant case. The ruling principle in the Washburn case is in no wise different from the rule as to public charities adopted in Missouri.

The devise and bequest in the case at bar was "for the purpose of creating an endowment fund for the education of worthy young men and women of a school district in Jewell County, Kansas, preference to be given by the trustees to those who are orphaned or who are fatherless or motherless and who are desirous or worthy of help in obtaining a higher education."

Under our rulings the trust created by this will is educational in its nature and constitutes a public charity. [Robinson v. Crutcher, 277 Mo. 1, 209 S. W. 104; Catron v. Scarritt Coll. Ins., 264 Mo. l. c. 725; Strother v. Barrow, 246 Mo. 241; Buchanan v. Kennard, 234 Mo. 117; Crow ex rel. v. Clay Co., 196 Mo. l. c. 260.]

From all of which it follows that the judgment of the trial court should be affirmed and it is so ordered.

All concur.

THE STATE ex rel. KANSAS CITY v. JAMES ELLISON et al., Judges of Kansas City Court of Appeals.

In Banc, April 1, 1920.

1. **CONFLICT IN OPINIONS: Reference to Pleadings and Instructions: Part of Record for Review.** Reference to the pleadings and instructions in the opinion of a Court of Appeals, though it neither outlines the petition or answer nor sets out the substance of the instructions with clarity, is sufficient to make both the pleadings and instructions a part of the opinion for purposes of review upon *certiorari*. Reference to a written instrument by the opinion of the Court of Appeals makes such instrument as much a part of the opinion as if fully set forth therein.

*Held*, by WALKER, C. J., dissenting, with whom WILLIAMS, J., concurs, that the purpose of the constitutional provisions authorizing the Supreme Court, upon *certiorari*, to review an opinion by the Court of Appeals, was to prevent a conflict between the decisions of the two courts, and cannot be extended beyond that purpose without impairing their constitutional jurisdiction to render final decisions in cases over which they are given appellate jurisdiction; that the review should be restricted to the conflict manifested by the opinion itself; that the Supreme Court's restriction upon its power of review, to pleadings, instructions and documents referred to in the opinion, is purely arbitrary, and can by a like arbitrary ruling be extended to a review of the whole transcript of the testimony and other evidentiary facts.

2. —: **Attractive Nuisance: Wall About Park.** A wall about a city park, twenty feet in height in places, but its height depending on the topography of the ground, topped with a coping thirty inches wide, is not an attractive nuisance, within the doctrine of the turntable cases, to a child, an invitee of the city, who, in play, enters upon the wall at a low place, and falls from it at its highest place, and the Court of Appeals, in approving an instruction which submitted to the jury that theory of negligence, contravened *Kelly v. Benas*, 217 Mo. 1. c. 13; *O'Hara v. Gas Light Co.*, 244 Mo. 1. c. 404, and *Buddy v. Union Terminal Ry. Co.*, 276 Mo. 276.

*Certiorari.*

WRIT QUASHED.

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*E. M. Harber and A. F. Smith for relator.*

(1) The trial court erred in refusing to give the peremptory instructions asked by the defendant, and the decision of the Court of Appeals affirming its rulings in that regard is at variance with controlling decisions of this court. (a) A person has a right to use only that part of public property to which he is invited, either expressly or by implication. There being no invitation, express or implied, to use that part of the park on which plaintiff was playing at the time of his injury, the city is not responsible for his injury. *Ely v. St. Louis*, 181 Mo. 729; *Glaser v. Rothschild*, 221 Mo. 185. (b) The city had, and exercised, the right to restrict by ordinance the use of its parks as playgrounds. The ordinance offered in evidence made it unlawful to use that part of the park on which plaintiff was playing at the time of his injury. The plaintiff has never questioned the validity of this ordinance, and it must therefore be given full force and effect. *Roper v. Greenspon*, 272 Mo. 296. (c) The wall in question was not such an "attractive nuisance" as to constitute an invitation to plaintiff to play upon it. *O'Hara v. Laclède Electric Co.*, 244 Mo. 404, 407; *Kelly v. Benas*, 217 Mo. 1; *Buddy v. Union Terminal Ry. Co.*, 207 S. W. 821. (2) Plaintiff's instructions assumed against the defendant facts which were at issue; they were so worded as to confuse the questions at issue, and thus mislead the jury; they placed upon the defendant the duty to exercise a degree and amount of care not required by law, and they submitted issues not properly before the jury. The decision of the Court of Appeals approving the giving of these instructions is contrary to controlling decisions of this court. *James v. Mo. Co.*, 107 Mo. 484; *Ganey v. Kansas City*, 259 Mo. 663; *Hipsley v. K. C. Co.*, 88 Mo. 354; *Baustian v. Young*, 152 Mo. 325; *Young v. Webb City*, 150 Mo. 341, and cases *supra*.

*Isaac B. Kimbrell* and *Martin J. O'Donnell* for respondent.

(1) The opinion of the Court of Appeals, in construing the ordinance mentioned in the opinion, is not in conflict with any prior decision of this court for the reason that this court has never construed said ordinance. *State ex rel. v. Sturgis*, 276 Mo. 599. (2) The opinion is not in conflict with that of this court in *Ely v. St. Louis*, 181 Mo. 723, for the reason that this court in that case found that the place alleged to be a public street in that case was not, while here the opinion finds that the coping from which plaintiff fell was included in the public park and that plaintiff had been invited to use the coping and that he fell into the chasm or precipice which the defendant negligently failed to fence. Under the authorities the verdict was therefore for the right party. *Healy v. City*, 211 S. W. 59; *Kuenzell v. City*, 212 S. W. 876; *Carey v. City*, 187 Mo. 715; *Capp v. St. Louis*, 251 Mo. 256; *Jenson v. City*, 181 Mo. App. 359; *Longwell v. City*, 203 S. W. 657. (3) The claim by relator that this is a "turntable case" and that this court has concluded not to allow a child to recover in the future when he invokes that doctrine is contradicted by the opinion which expressly finds that the plaintiff was using the park and the coping, which was part of same, under the rules provided by the park board and at the invitation of relator. Furthermore, the turntable doctrine, though badly bent by some recent decisions of this court, is not yet broken. *Carey v. City* 187 Mo. 715; *Bjork v. City*, 135 Pac. 1009; *Price v. Water Co.*, 58 Kan. 551; *Pekin v. McMahon*, 45 Am. St. 114, 154 Ill. 141. (4) Even had the trial court in its instructions assumed that certain facts put in issue by the pleadings were conclusively established by the evidence, yet an opinion approving such instructions would not conflict with the prior decisions of this court, but would be strictly in accord with same. *Fullerton v. Fordyce*, 121 Mo. 113; *Davidson v. Transit Co.*, 211 Mo.



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356; *Donovant v. Co.*, 188 Mo. App. 93; *Ragan v. Railway*, 144 Mo. 623; *Setebier v. Railway*, 203 Mo. 702. • (5) This court on *certiorari* cannot properly quash a judgment of the Court of Appeals for failure to reverse because of the giving of instructions, for it often happens that the appellate court finds that the verdict is for the right party, and in such case the statute and the common law prohibits a reversal because an erroneous instruction may have been given. *Thompson on Charging the Jury*, secs. 117, 118; Sec. 2082, R. S. 1909; *State ex rel. v. Reynolds*, 270 Mo. 589. (6) The relator's abstract of the record does not include the judgment of the trial or appellate court, nor does it include the record entries of the Court of Appeals, and consequently this court on scrutinizing the record will dismiss the case on its own motion. *State ex rel. Pedigo v. Robertson*, 181 S. W. 987; *Huston v. Allen*, 236 Mo. 645; *Hays v. Foos*, 223 Mo. 423.

GRAVES, J.—*Certiorari* to the Kansas City Court of Appeals. By this proceeding it is sought to have this court quash the judgment of the Court of Appeals in the case of *Russell Barnett*, by next friend, respondent, v. *Kansas City*, appellant.

The opinion of the Court of Appeals neither outlines the petition nor answer in the case, although reference, in a way, is made to both. Nor is the substance of the instructions considered by the opinion set out with clarity in the opinion. In the opinion we find this brief reference to the instructions:

“Defendant has presented a great number of criticisms to the instructions given for plaintiff. Instruction No. 1 covers the case as made by plaintiff and we do not find any substantial objections to it. It is supported by the petition and the evidence.

“Instruction No. 2 is no more than a harmless abstract statement of the law. The only objection made is that it is said to compel the city to keep all parts of the park reasonably safe for children. We must

read the instruction in connection with the evidence. There is no dispute as to the parts of the park where children usually played and where plaintiff was playing when hurt, and allowing to the jury any common sense, they knew the question was whether care and prudence required defendant to have it reasonably safe at those places; and that was stated in Instruction No. 3.

"That instruction submitted whether the coping at the place where plaintiff was playing was attractive to children as a part of the recreation ground. That was no more than submitting to them whether it was not a part of the park likely to be chosen by children who frequented the grounds in quest of amusements they were permitted to enjoy there.

"Instructions Nos. 4 and 5, relating to the definition of negligence and the measure of damages, are not objectionable.

"Six instructions were refused for defendant. If what we have written is correct, they were properly refused. They consisted chiefly in absolute declarations as matters of law and were in practical effect demurrers to the evidence."

The evidentiary facts of the case are thus set out in the opinion:

"Plaintiff, a boy eight years of age, instituted this action through a next friend, for damages resulting in serious injury to him by falling from the top of a retaining wall to the street below, a distance of nearly twenty feet. He recovered judgment in the trial court.

"At an elevated place within its limits the defendant city maintains a large reservoir which has a tract of land surrounding it, set apart and maintained by the city as a public park, known as 'Observation Park.' The reservoir is enclosed with a wire fence and around it is a gravel walk about six feet wide. The topography of the ground and the grading of the streets about it left precipices. These were supported by high stone walls topped with coping about 30 inches wide. At least one stone stairway led up from the street to the reservoir.

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There were seats in the park space and the public were free to go there at will. Band concerts were given of evenings, when thousands of people, half of them children, would attend. Children were in the habit of playing there. It was common for them to 'run races' on the gravel walk around the reservoir, and to walk around on the coping. A watchman in charge knew this. There was evidence tending to show that the watchman ordered boys to keep off the grass and the rock wall. A boy twelve years old testified that boys, including himself, played at that part of the park. That he had lived near there 'quite a while and used to play there all the time.' That at the time plaintiff was hurt, the boys 'were divided into two armies and had been playing soldier about an hour and a half or more before he [plaintiff] got hurt.' There was also evidence tending to show that the watchman at other times than the time in question ordered the boys to keep off the grass. That at times when boys would get on the wall he (the watchman) would run them off and tell them to stay off, 'that we would get hurt—once in a while maybe.' On the day of his injury, a number of boys, including plaintiff, were playing 'American Soldier,' and this included running on the top of these retaining walls. They were higher in some places than others and in some parts the ground sloped up from the top of the wall to the reservoir. At a place where it was about twenty feet down to the paved street plaintiff was on the wall engaged in the play, when, as he testified, 'another boy started to come along and I thought he was going to hit me and stepped backward and stepped off,' falling to the bottom.

"There was abundant evidence tending to show knowledge on the part of the city that children were in the habit of playing in the park, and we readily approve of the action of the trial court in refusing defendant's demurrer to the evidence."

This is the outline as gathered from the opinion, but the horizon broadens when we go to the pleadings and instructions referred to in the opinion.

The negligence charged is thus stated in the petition:

"Plaintiff further states that it was the duty of defendant to exercise reasonable care to prevent injury to patrons of said park; to erect and maintain a proper and sufficient fence and guards at or near the edges of said precipice so created by said parkway and said coping, and particularly at and near the southeast corner of said block, near the intersection of said Twenty-first and West Prospect streets, to prevent children engaging in playing or walking in said parkway and on said coping from falling over the precipice to said Twenty-first Street and being killed and injured, and also to have said parkway and coping properly watched and guarded, to prevent children from falling over said precipice.

"Plaintiff further states that defendant negligently failed to provide any fence or protection whatsoever on the said coping and between it and said park and parkway, and negligently failed to have same properly watched or guarded for the protection of children, as aforesaid."

After a general denial, and a plea of contributory negligence, the answer, thus proceeds:

"Defendant further says that by Section 1046 of the Revised Ordinances of Kansas City, approved February 2, 1910, it was provided that 'no person shall play any game whatsoever in or upon any of the parks, boulevards, avenues, streets, parkways or park roads under the control of the Board of Park Commissioners; provided, however, that ball, cricket, lawn tennis and other games of recreation may be played upon such portions of said parks as may be designated from time to time by the Board of Park Commissioners, and under such rules and regulations as may be prescribed by said Board. The grass plots or lawns of public park and parkways shall not be used by any person as thoroughfares in crossing from one roadway, walk or street to another roadway, walk or street,' and that the use of

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public parks or parkways as pleasure grounds by the people for the purpose of recreation must be under such reasonable rules and regulations as may be prescribed by the Board of Park Commissioners.

"Defendant further says that the Board of Park Commissioners never provided any rule or regulation permitting persons to play, or use for the purpose of recreation, or otherwise, that part of the ground upon which plaintiff was playing at the time he claims to have been injured, and under rules and regulations of said Board of Park Commissioners, playing at the place where plaintiff was playing at the time he claims to have been injured was against the rules and regulations of said Board of Park Commissioners.

"Defendant further says that by Section 1058 of said Revised Ordinance, it was made a misdemeanor for any person to violate any of the provisions of said Section 1046.

"Wherefore, having fully answered, the defendant prays to be dismissed with its costs."

That portion of the answer is referred to in the opinion.

Divers conflicts between this opinion and our opinions are suggested in the petition for our writ, and the brief for relator. These, and further facts, we leave for the opinion.

I. The scope of our review becomes important in this case. The opinion before us from the Court of Appeals is limited in its reference to the pleadings, and to the instructions. There is, however, direct reference to each. This suffices to make them and each of them a portion of the opinion for the purposes of this review. Reference in the opinion to a written document in the case, makes it as much a part of the opinion, as if fully written out therein.

For consideration of the petition in full, we have direct authority in *State ex rel. v. Ellison*, 176 S. W. 1. c. 12. This opinion has the concurrence of four judges, and on the question here involved, really of six judges.

**Reference  
to Pleadings.**

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It will be noted that whilst BOND, J., dissented, he dissented on the "question of our jurisdiction only." BLAIR, J., was not sitting, but his own writings later, and his votes later so place his views.

In State ex rel. v. Robertson, 188 S. W. 1. c. 102, we had upon *certiorari* an opinion of the Springfield Court of Appeals. It referred to a previous opinion of such court in the same case. We held that this reference made such previous opinion a part of the opinion brought up by our writ of *certiorari*. In this all the judges In Banc concurred, except Woodson, J., absent, although BOND, J., concurred only in result.

The next case in order is that of State ex rel. v. Ellison, 191 S. W. 1. c. 53, whereat BLAIR, J., said:

"The order of publication is not set out in the opinion. Nevertheless, it is expressly referred to and made the basis of a distinct holding. The effect of this is to incorporate it in the opinion and require that it be treated and examined as a part of it. No one would doubt that any court in citing and applying the decision on this point would be under the necessity of consulting the record and construing the opinion in connection with the order of publication the record shows. If a reference of this sort in an opinion does not, in accordance with the general rule, warrant this court in treating the matter referred to as thereby made a part of the opinion for the purposes of writs like this, then the harmony of decision required to be maintained means only a surface harmony which may disappear as soon as it is determined what the opinion under examination really means. Such a result is unreasonable. The order of publication is to be held incorporated by reference."

This case had the concurrence of all the judges except FARIS, J., not sitting. BOND, J., as usual in these *certiorari* cases (about this time), concurred in the result.

Following this is the case of State ex rel. v. Ellison, 195 S. W. 1. c. 722, whereat we said:

"The record is somewhat broadened because the opinion before us refers specifically to the two previous

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opinion for the facts. We have, therefore (by this reference in the last opinion), not only the three opinions of the Court of Appeals, but likewise such records and evidence as are incorporated therein, either by reference or by direct quotation. Under these circumstances, it would be indeed singular if the complete record in the Court of Appeals was not before us through their several opinions."

This opinion had the concurrence of all the judges In Banc, except WILLIAMS, J., not sitting, and BOND, J., who dissented. It will be noted that FARIS, J., who was not sitting in the case written by BLAIR, J., *supra*, concurs in this opinion.

Next in line follows the case of State ex rel. v. Robertson, 197 S. W. 1. c. 79, where we again held that a previous opinion of a Court of Appeals was made a part of the opinion before us, because it was directly referred to therein. We thus ruled over objection duly made here, and in so ruling said:

"The case of Allen v. Quercus Lumber Co., has been twice before the Springfield Court of Appeals. The first opinion, which reversed a judgment for plaintiff, is found in 190 Mo. App. 399, 177 S. W. 753. The second opinion, the one brought up by our writ, is found in 190 S. W. 86. We mention both opinions because the latter refers to the former for a statement of the facts as to how the plaintiff was injured. Respondents urge that the first opinion is not before us, but the reference thereto in the second opinion both in law and in fact makes it a part of the second opinion."

This opinion was concurred in by all the judges, except FARIS, J., who dissented. BOND, J., as usual in this character of cases, concurred only in the result.

So runs the case law of the State until our lamented Brother Bond (whose opposition to our jurisdiction in this class of cases is manifest from the books) wrote State ex rel. Wahl v. Reynolds, 199 S. W. 978. In that case (with an eye always single to the curbing of our jurisdiction in *certiorari* cases) our late lamented and distinguished brother, said:

“In the rulings of this court permitting the use of a writ of *certiorari* in cases like the present (in which I am unable to concur), it is distinctly announced, as I understand, that the scope of review does not extend to any errors of opinion on the part of the Court of Appeals which do not conflict with the latest previous rulings of this court on the subject, nor does it embrace any consideration of the record of the case in the Court of Appeals further than the same is set forth in the opinion under review.”

In this opinion he had the concurrence of three other judges at that time. Note the use of the words “set forth” in the language of our learned brother. This of itself does not exclude the idea that an instrument which is clearly referred to in the opinion is not “set forth” in the opinion, as our previous cases had all held. But later our brother WILLIAMS in *State ex rel. v. Reynolds*, 200 S. W. 1. c. 1041, cited and quoted the foregoing language from Wahl’s case, *supra*, and with two judges not sitting, he received only one concurrence to paragraph one of his opinion which covered this question. The present writer’s individual views are expressed in a concurring opinion, 200 S. W. 1. c. 1041. Whereas we were not certain what Judge BOND meant by the words “set forth” in Wahl’s case, we were taking no chances on approving the language. We had dissented in Wahl’s case, as we had two others.

By a scant majority of the court, we have ruled that in *certiorari*, we will go to the opinion of the Court of Appeals for the evidentiary facts and the things determined, but we have all the while ruled that reference to a written instrument by the opinion made such instrument as much a part of the opinion as if fully set out therein. This ruling should not be disturbed, nor does Wahl’s case in language disturb it. The case at bar is a splendid example of what would happen if this rule should be abolished. No one could tell from the opinion before us what grounds of negligence were relied upon by the plaintiff. So too the instructions are referred to by number, but



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with much diligence you could not find from the opinion what was in instruction one and two for plaintiff. It is said that Instruction No. 3 for plaintiff submitted the question as to whether or not the wall and coping was attractive to children. We do not say this by way of criticism, but as illustrative of the point, that we should include as a part of the opinion all instruments referred to in such opinion. If our rule remains as we have written it, no harm comes from this short method of opinion, because we examine the pleadings and the instructions referred to in such opinion. We rule that we should go to the pleadings in this case, and also to the instructions, because they are in law and fact a part of the opinion by reason of the direct references therein.

The pleadings may be examined even on another theory. See concurring opinion in *State ex rel. v. Reynolds*, 200 S. W. 1. c. 1041. An interesting review of our cases upon *certiorari* up to August 23, 1916, is found in an able article by Hon. J. P. McBaine, in 13 Law Series, Missouri Bulletin, from pages 30 to 75 inclusive.

II. It will be gathered from the petition that there were two grounds of negligence charged against the city, (1) failure to put a fence on the coping so as to keep persons using the coping from falling therefrom, and (2) **Negligence Charged.** failure to have such coping properly watched and guarded. Instruction one for plaintiff, which the Court of Appeals says covers the case, omits the second ground of alleged negligence, and predicates the right of the plaintiff to recover solely on the failure to have a fence upon such coping. The evidence as finally stated in the court's opinion discloses that the city did have a person there who warned children not to play on the coping. This perhaps accounts for the abandonment of this alleged ground of negligence. As to evidentiary facts we shall confine our case to the facts found by the Court of Appeals. So that from this and the preceding paragraph may be gathered the full scope of our review upon the question of conflict of opinions.

III. In this case we need not go beyond the opinion of the Court of Appeals, construed even in the restricted sense of State ex rel. Wahl v. Reynolds et al., supra. In so saying we do not want to be understood as departing in the least from our rulings in paragraph one of this opinion. On the contrary we wish to reiterate that all documents (whether pleadings, instructions or other written documents) referred to in the opinion, are just as much a part of the opinion as if written out therein *in haec verba*.

The opinion says that Instruction No. 3 for the plaintiff presented to the jury the doctrine of the turntable cases, i. e. "an attractive nuisance." Whilst the opinion is not very explicit, we have examined the instruction, and in fact the instruction does present such a theory of recovery, and the petition charges that the coping was attractive to children, and bottoms the right to recover on the negligence of a failure to fence, or a failure to guard it. The latter, as said, was dropped by plaintiff at the trial, as evidenced by the instructions.

From the facts may be gathered the idea that the city had enclosed the block constituting "Observation Park" by stone walls, wherever the same were required by the topography of the ground. At places the wall was near 20 feet high, but in plain and open view of all who might be on the premises.

At most the opening of the park by the city, if in fact it had been fully opened to the public, would make the plaintiff at best but an invitee of the city. On the theory that the portion of the park where the accident occurred had been opened to the public (a fact that the city denied and offered an ordinance in support of its denial) the plaintiff was in the park as an invitee. He was one invited there by the city. In such case the well defined turntable doctrine of an attractive nuisance has no application to the facts of this case. That there might be an attractive nuisance on the premises of one who invites the public is not questioned, but what we mean is that a wall which encloses the premises, as did the wall

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in question here, is not in law an attractive nuisance, and for that reason this case does not fall within the doctrine of the turntable cases.

To the invitee is owed the duty of exercising reasonable care for his safety. He must be guarded against hidden pitfalls and dangers not open and glaring, but the doctrine of the turntable cases is that the instrument itself invites the child, and is usually found in cases where the child is a trespasser or at most a mere licensee. The real question is whether or not a wall which incloses one's premises is such an instrument as to bring it within the purview of the turntable cases, the doctrine of which was invoked by plaintiff's instruction three, *supra*.

In many places in this, the capital city of Missouri, are walls enclosing private residences, which walls vary in height with the topography of the ground. Should one of these owners invite the children of his neighborhood to play upon his lawn, would he be liable on the ground of maintaining an attractive nuisance? We think not. Yet those children would be as much invitees as is the general public to a park opened up by the city. The fence around this park, which is the walls which enclose it, is not such as to place it within the category of an attractive nuisance, which is the theory of instruction three for the plaintiff. •

We but repeat and emphasize the language of LAMM, J., in *Kelley v. Benas*, 217 Mo. l. c. 13, whereat he most eloquently said:

"If the old channel of the law is to be quite changed by the application of the new doctrine automatically and without discrimination, if sentimental considerations (however elevated and tender) are to usurp the place of cold and calm reason as the foundation for rules of law, then the floodgate now damming back liability will be raised, letting in strange and deep waters for the landowner to struggle with."

He was not dealing with an invitee, but he was dealing with things which do and which do not constitute an attractive nuisance within the meaning of the turntable

cases, and holds a pile of lumber (quite high in that case) was not within the turntable rule. A high pile of lumber, so placed as would permit boys to climb upon it, is no less attractive than the wall in the case before us, yet LAMM, J., ruled that it did not fall within the turntable rule, as an attractive nuisance. The action of the Court of Appeals in approving instruction three conflicts with the Kelly-Benas case. In so ruling we have in mind the sole question of what constitutes such an attractive instrumentality as to bring it within the turntable rule.

In our judgment it likewise conflicts with O'Hara v. Gas Light Co., 244 Mo. 1. c. 404 et seq. At page 405 we then said:

"As above indicated our court has followed the middle ground, and has been exceedingly slow to enlarge the field of the 'turntable doctrine.' For a full review of all our cases beginning with the Overholt-Vieths case, cited supra, see the recent case of Kelly v. Benas, 217 Mo. 1."

When we used the words "as above indicated" we were referring to the classification of states upon the turntable doctrine as made by the court in Brown v. Salt Lake City, 33 Utah, 1. c. 236, whereat it was said:

"In some states where the doctrine prevails the courts have sought to limit its application to open and dangerous machinery and appliances. Of this class Sullivan v. Huidekoper, 27 App. Cas. (D. C.) 154, 5 L. R. A. (N. S.) 263; Overholt v. Vieths, 93 Mo. 422; Richards v. Connell, 45 Neb. 467, and Stendal v. Boyd, 73 Minn. 53, are fair examples."

This court has consistently refused to extend the turntable doctrine. The Court of Appeals, in the face of our ruling, has extended it. For a full review of all the cases see the recent opinion of FARIS, J., in Buddy v. Union Terminal Ry. Co., 207 S. W. 821. This review of our State law is so recent that another at this time would be unpardonable in an opinion, where brevity should be sought. It is sufficient to say that the ruling of the Kansas City Court of Appeals in sustaining instruction three for plaintiff in the instant case, controverts the

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rule announced by this court in each of the three cases, supra. In other words, an enclosing wall of a tract of ground is not an attractive nuisance within the rule fixed by this court. For this their record and judgment should be quashed.

There are other matters suggested, and some of them are well worthy of consideration, but as our present ruling is such as to compel the Court of Appeals to reverse and remand the cause, the other questions may be obviated on a retrial. In this kind of a proceeding we are not instructing trial courts. We are simply determining conflict of opinions. If we find there is a conflict upon a question which would of necessity reverse the action of the Court of Appeals, as here, then we need seek no further reason for quashing its record and judgment. Let the record of the court of Appeals be quashed. *Blair, Goode and Williamson, JJ.*, concur; *Walker, C. J.*, dissents, in opinion filed, in which *Williams, J.*, joins; *Woodson, J.*, not sitting.

WALKER, C. J. (dissenting).—Whatever may heretofore have been defined by this court as the limit of our review in *certiorari* proceedings when directed against the Courts of Appeals, I have reached the conclusion that our inquiry should be confined to the opinions of those courts. The Constitution and the statutes in no uncertain terms declare definitively the respective jurisdictions of the Supreme Court and the Courts of Appeals. The line of demarcation between these jurisdictions is not difficult to determine. Each within its own prescribed limits was intended to be supreme. The supremacy of the jurisdiction of the Supreme Court ends, however, where that of the Courts of Appeals begins. If this were not true the latter courts would not be courts of last resort within their prescribed province. That they are such courts is evident not only from express constitutional declaration, but from the fact that, although the Supreme Court is given general superintendence over subordinate courts, with the right to issue original

and remedial writs, including *certiorari*, the framers of the Constitution, recognizing the supremacy and final determinative power of the Courts of Appeals in regard to their own opinions, found it necessary to expressly declare when and how the Supreme Court was empowered to review the opinions of the Courts of Appeals. The power thus conferred constituted an exception to the general jurisdiction of these courts and should be strictly construed. The reason of the law, however, is the life of the law; and the reason of this exception was to prevent a conflict between the rulings of the Supreme Court and the Courts of Appeals. Such rulings are given authoritative expression only in the opinions of these courts. To these, therefore, we must refer to determine if a conflict exists. Take, for illustration, the opinion of the Court of Appeals in the case at bar; if it discloses no conflict with former decisions of the Supreme Court, then within the meaning of the Constitution such conflict does not exist. If other meaning than this was intended by the organic limitation, then there does not exist any final jurisdiction of the Courts of Appeals. Granted the power to review anything referred to but not ruled upon in the opinion of the Court of Appeals that may give heart to the hope that a conflict may be found, and the entire record of the trial court is rendered subject to review. My learned brother has, it is true, in the majority opinion in declaring what constitutes the exploratory examination of the Supreme Court, limited the same to papers or documents referred to in the opinion under review. This limitation, however, under our construction of the Constitution, is purely arbitrary. If authorized to look to any paper referred to in such opinion, by which I understand is included not only documents in evidence but pleadings and instructions, then by what system of reasoning can the transcript of the testimony be excluded from consideration. There is as much authority, so far as the constitutional provision is concerned, for referring to the one as to the others.

Such a construction destroys the distinctive character of the proceeding at bar and substitutes in its stead

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a rehearing by the Supreme Court of the case finally determined in the Court of Appeals. This conclusion is based upon no technical construction of the Constitution. It finds its sufficient support in that commendatory feeling of confidence which should be and is entertained by the Supreme Court in regard to the correctness of the findings of the Court of Appeals as disclosed by its opinion. That confidence cannot be construed as otherwise than violated if the constitutional limitation be ignored. The importance of preserving inviolate, as by the law prescribed, the respective jurisdictions of the Supreme Court and the Courts of Appeals has impelled me to dissent to the majority opinion and to conclude that our writ should be quashed. *Williams, J.*, concurs herein.

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ANABEL WELCH v. JAMES HARVEY et al.;  
CYRUS FINLEY et al., Appellants.

In Banc, April 1, 1920.

1. **DEED: Construction: The Whole Instrument: Granting Clause: Habendum.** In construing a deed, the intention of the parties, as gathered from the entire instrument, together with the surrounding circumstances, are to be ascertained and given effect, unless in conflict with some positive rule of law or repugnant to the terms of the grant itself; and in gathering such intention from the instrument, the court will ignore technical distinctions between the various parts and seek the grantor's intention from them all, without undue preference to any, giving due effect to all, even to the extent of allowing the *habendum* clause to qualify or control the granting clause where it is manifest that the former, in connection with the whole, more nearly expresses the grantor's intention.
2. ———: ———: ———: ———: **Parenthetical Clause.** The deed made in 1867 recited that the grantors, "in consideration of the regard and affection we have for our daughter Fannie E. Finley and of the payment of eight hundred dollars by William Finley," do "hereby convey and sell to said Fannie and William two hundred and fifty acres. . . . most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to

Fannie." *Held*, that the granting clause is a clear and unambiguous conveyance to Fannie and William, and is not limited by the last parenthetical words, which are of doubtful and uncertain meaning and application.

*Held*, by WILLIAMSON, J., dissenting, with whom BLAIR and GOODE, JJ., concur, that if an estate by the entirety had been intended the intention would have been expressed in some other words than the mere granting clause, and that the instrument as a whole declared an express purpose of a sale of fifty acres to William and a gift of two hundred to Fannie, and that purpose is strengthened by the order in which the grantees are named, in that the granting clause says that the grantors "convey and sell to Fannie and William," which in effect means that they convey to Fannie and sell to William.

3. ———: ———: ———: ———: ———: **No Several Tract: Husband and Wife: Change in Law.** That the clear words of the granting clause were not restricted by the ambiguous subsequent clause is reinforced by two other facts: *first*, the deed contains no word or phrase indicating that the grantors intended to convey in severalty to their daughter and her husband distinct parcels; and, *second*, at the time the deed was made (1867) the notion of unity of property and person of husband and wife was firmly fixed in the popular mind and in the law, and it was not unusual for a father, when he gave real estate as an advancement to a daughter, to deed it to both.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that a gift, by deed, to the daughter alone, had no tendency to divert the title from the descendants of the grantors, and to construe the deed in judgment as a conveyance of an estate by the entirety to the grantors' daughter and her husband, and the vesting of the title first in him by her death and then in his collateral kindred upon his death is to vest the title in strangers to the grantors' blood, which is a result in no wise contemplated by the terms used in the deed.

4. ———: ———: **The Word Sold.** The word "sold," unaccompanied by others of apter significance, is not ordinarily a word of conveyance, but will be so considered in a proper setting, or where clearly so intended.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that the natural order of the words in a conveyance, and the usual sequence of events, is "sell and convey," and not "convey and sell;" and this reversal of the order in a deed by parents to a daughter and her husband, by which they "convey and sell to Fannie and William," is of significance, for there, the deed expressing as its consideration regard and affection for the daughter and a payment of \$800 by



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her husband, the meaning is that they conveyed to the daughter (the two hundred acres subsequently mentioned in the deed) and sold to him (the fifty acres mentioned therein).

Appeal from Lincoln Circuit Court.—*Hon. Edgar B. Woolfolk*, Judge.

REVERSED.

*Sutton & Huston* and *J. W. Powell* for appellants.

(1) Both the statute law and the decisions conclusively establish that this conveyance created an estate by the entirety in William Finley and Fannie Finley, his wife. *Gibson v. Zimmermann*, 12 Mo. 386; *Garner v. Jones*, 52 Mo. 68; *Modrell v. Riddle*, 82 Mo. 31; *Edmondson v. City of Moberly*, 98 Mo. 523; *Bains v. Bullock*, 129 Mo. 117; *Hume v. Hopkins*, 140 Mo. 65; *Wilson v. Frost*, 186 Mo. 311; *Moss v. Ardery*, 260 Mo. 595; R. S. 1909, sec. 2878; *Steifel Union Brewing Co. v. Saxy*, 273 Mo. 171; *Ashbaugh v. Ashbaugh*, 273 Mo. 357. (2) Counsel insist that the intention to convey separate estates is shown by the use of the words "convey and sell" as used in the granting clause. We contend that it would be just as reasonable to contend that five separate estates were conveyed, had the scrivener used the words, "grant, bargain and sell, convey and confirm," as is commonly used now. *Garner v. Jones*, 52 Mo. 68. When the entire deed is taken into consideration, it is quite evident that the grantor did not intend that this expression should in any way affect the conveyance, but that the purpose of inserting this expression in the deed was to show his other heirs how much of this conveyance to William and his wife was an advancement, and for how much of the property conveyed, cash was paid. (3) It is no unusual thing for parents to convey property to their daughter and son-in-law and inject into the deed of conveyance such statements and expressions as appear in this deed, and still intend to convey an estate by the entirety. *Garner*

v. Jones, 52 Mo. 68. (4) Whenever a doubt arises as to whether or not a conveyance to a man and wife creates an estate by the entirety or some other interest, the courts, whenever it is possible, construe the deed in such a manner as to convey an estate by the entirety. *Wilson v. Frost*, 186 Mo. 311; *Garrett v. Wiltse*, 252 Mo. 712; *Ashbaugh v. Ashbaugh*, 273 Mo. 358. (5) It is a well-established rule both at common law and under modern decisions that if two clauses of a deed are so repugnant that they cannot stand together, the first clause will be sustained and the latter rejected. *Webb v. Webb*, 29 Ala. 588; *Petty v. Boothe*, 19 Ala. 633; *Gould v. Womack*, 2 Ala. 83; *Tubbs v. Gatewood*, 26 Ark. 128; *Doe v. Porter*, 3 Ark. 18; *Havens v. Dale*, 18 Cal. 359; *Daniel v. Veal*, 32 Ga. 589; *Cutler v. Tufts*, 3 Pick 272; *Blackwell v. Blackwell*, 124 N. C. 269; *Pike v. Munroe*, 36 Me. 309. And whatever is expressly granted cannot be diminished by subsequent restrictions. *Pike v. Munroe*, 36 Me. 309. And subsequent clauses of doubtful import will not be so construed as to contradict preceding clauses. *Perry v. Boothe*, 19 Ala. 633. And doubtful words inserted after words of a grant will not qualify a conveyance. *Ex Parte Durfee*, 14 R. I. 47; *Miller v. Tunica Co.*, 67 Miss. 651. It is also very generally held that even the habendum clause of a deed, though it may materially restrain, lessen, enlarge, explain, vary or qualify, may not contradict or be repugnant to the estate granted by the granting clause of the deed. 2 *Blackstone's Commentaries*, 298; *Haffner v. Irwin*, 20 N. C. 433; *Mowry v. Bradley*, 11 R. I. 370; *Donnan v. Intelligencer etc. Co.*, 70 Mo. 174; *Halifax Cong Soc. v. Stark*, 34 Vt. 243; *Edwards v. Beall*, 75 Ind. 401; *Adams v. Dunklee*, 19 Vt. 382; *Welch v. Welch*, 183 Ill. 257; *Green v. Sutton*, 50 Mo. 192.

*Avery & Killam* for respondent.

(1) Fannie having preceded William in death, the 50 acres belonged to William absolutely, and there is no estate in entirety, in either the one or the other, but the

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collateral heirs of William are entitled to the 50 acres because of Fannie's death before his, and the 200 acres that was given to Fannie belonged absolutely to Fannie, and under the statute he, having outlived Fannie, owned one-half and his collateral heirs are entitled to that one-half, and the collateral heirs of Fannie are entitled to the remaining one-half. (2) Mr. and Mrs. Reid owned the land. Mrs. Finley was the daughter. The mother and father wanted to convey this land to her, that is, 200 acres of it. There was a tract of 250 acres. The son-in-law was willing to buy the 50 acres, the most eastern part of the 250 acre tract. He did buy it and he paid an adequate consideration \$800. Then they wanted to give to her, Fannie, not William, 200 acres of land. The Reids conveyed the whole 250 acre tract, conveyed all of the 250 acres to Fannie and William, but they conveyed it in separate tracts; they conveyed 50 acres to William, which he bought, and they gave 200 acres to their daughter, Fannie. *Buxton v. Kroeger*, 219 Mo. 221. (3) It is a cardinal rule for the interpretation of contracts, that the intention of the parties shall be effectuated. *Roseberry v. Benevolent Assn.*, 142 Mo. 552; *Arnett v. Williams*, 226 Mo. 109; *St. Louis v. Railroad*, 228 Mo. 712; *Walsh v. Woodmen*, 148 Mo. App. 179; *Webb v. Ins. Co.*, 134 Mo. App. 576. The court will not give a contract such a construction as will permit one party to secure an unreasonable advantage over the other party unless compelled to do so by the language of the contract. *Lead Co. v. Ins. Co.*, 162 Mo. App. 332.

**RAGLAND, C.**—This suit was instituted in the Circuit Court of Lincoln County by the plaintiff as one of the collateral heirs of Fannie E. Finley, deceased, against the remaining heirs of said deceased and the collateral heirs of William Finley, deceased, for the partition of certain lands in said county. The defendant heirs of Fannie E. Finley filed no answer; the heirs of William Finley answered, denying that the plaintiff and their codefendants, heirs of Fannie E. Finley, had any right, title or interest in the lands sought to be partitioned,

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claiming that they as heirs of William Finley were the sole owners thereof in fee simple, and praying the court to so adjudge.

The facts are brief. William Finley and Fannie E. Finley were husband and wife on the 28th day of August, 1867, and continued so to be until the death of Fannie, which occurred about the year 1909; William died January, 1916. They left no descendants. Appellants are the collateral heirs of William, and respondent and the remaining defendants are the collateral heirs of Fannie. Fannie E. Finley was a daughter of James and Lucy Reid, who on the 28th day of August, 1867, executed the following deed:

"Know ye all persons whom a knowledge of this transaction may concern that we James Reid Sen. and Lucy, his wife, of the County of Lincoln and State of Missouri, do by these presents for and in consideration of the regard and affection we have for our daughter Fannie E. Finley and of the payment of eight hundred dollars lawful money of the United States well and truly paid, by William Finley of the County of Lincoln and State of Missouri, the receipt of which is hereby acknowledged hereby convey and sell to said Fannie & William the following described tract of land containing two hundred and fifty acres eighty-five acres described as the land we bought of the widow and heirs of James Downing deceased the remaining one hundred and sixty-five acres described as follows. Begin at a stone corner of D. H. Whitesides. Then with the northern line of said Whitesides south sixty-eight degrees west sixteen chains and twenty-five links to corner in the spring branch. Then north twenty-one and half degrees west with the northeast line of the Downing tract of land twenty-seven chains and sixty-five links to the northeast corner of said land on the line of S. Weeks. Then with said line north sixty-eight degrees east thirty-one chains and twenty-five links to corner of said Weeks. Then north twenty-one and a half degrees west one chain and eighty links to a stone corner of James Willson. Then north sixty-eight degrees east fifteen chains and thirty

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links and set a stone for corner from which a white oak twelve inches bears south forty-nine degrees east twenty-nine links distant. Then south twenty-one and a half degrees east forty-seven chains and set a stone for corner from which a white oak twenty inches bears north ten and a half degrees east twenty-two links distant. Then south eighty and a half degrees west ten chains and fifty-nine links to a corner of D. H. Whitesides with a buck-eye bearing tree. Then north seventy-nine degrees west twenty-three chains and sixty-eight links and set a stone from which a white oak eighteen inches bears south eighty degrees east thirty links. Then north twenty-one and a half degrees west two chains and fifty-five links to the place of beginning containing in all two hundred and fifty acres most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to Fannie reserving to ourselves the right of way through said tract of land where said way may be least prejudicial to the same to a tract of we own and joining to and east of it all of which land is in and part of Survey eighteen hundred and thirteen or as some number it eighteen hundred and nineteen a grant of four thousand arpens to Peter Jamin situate in Township No. fifty-one and range one east and one west to the said Fannie and William with all and singular the appurtenances to the same belonging free and clear of all legal incumbrances whatsoever. In Testimony of which we hereunto set our hands and affix our seals this twenty-eighth day of August eighteen hundred and sixty-seven.

“JAMES REID SR. (Seal)

“LUCY REID (Seal).”

It is respondent's contention that the foregoing instrument conveyed severally to William Finley the most eastern fifty acres of the land therein described and to Fannie E. Finley the remaining two hundred acres. It is this two hundred acres that she seeks to have partitioned. If her contention is sound, it follows that upon the death of Fannie without descendants her husband, William, under the statute, became vested with the title to an undivided one-half interest in the land and the

remaining one-half descended to her heirs, and later upon the death of William his one-half descended to his heirs. The appellants, on the contrary, insist that the deed to Fannie and William conveyed the whole tract of two hundred and fifty acres to the two of them, whereby they became vested with an estate by the entirety in the whole, and that the death of Fannie left her husband, William, the sole owner in fee.

The trial court first found for appellants and rendered judgment accordingly. Later, deeming its conclusion erroneous, it sustained a motion for a new trial. This appeal is from that order. It is apparent that the proper construction of the deed is the only matter for our determination.

Whether the deed conveys the entire tract of land to both grantees, or whether it conveys to each of them severally a separate portion thereof, must be ascertained from the four corners of the instrument itself. For the rule has long obtained in this State, that, in construing a deed, the intention of the parties, as gathered from the entire instrument, together with the surrounding circumstances, shall be ascertained and given effect, unless in conflict with some positive rule of law, or repugnant to the terms of the grant itself, and that in gathering such intention from the instrument the court will ignore technical distinctions between the various parts and seek the grantor's intention from them all, without undue preference to any, giving due effect to all, even to the extent of allowing the *habendum* clause to qualify or control the granting clause where it is manifest that the former, in connection with the whole, more nearly expresses the grantor's intention. [Tennison v. Walker, 190 S. W. 9; Adams v. Highland Cemetery Co., 192 S. W. 944.]

Omitting the long descriptions of the land conveyed and of the right of way reserved, the deed under consideration is as follows:

"Know ye all persons whom a knowledge of this transaction may concern that we James Reid Sen. and Lucy, his wife, of the County of Lincoln and State of

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Missouri, do by these presents for and in consideration of the regard and affection we have for our daughter Fannie E. Finley and of the payment of Eight Hundred Dollars lawful money of the United States well and truly paid, by William Finley of the County of Lincoln and State of Missouri, the receipt of which is hereby acknowledged hereby convey and sell to said Fannie & William the following described tract of land containing two hundred and fifty acres . . . *most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to Fannie* reserving to ourselves the right of way through said tract of land. . . . to the said Fannie and William with all and singular the appurtenances to the same belonging free and clear of all legal incumbrances whatsoever.

“In Testimony Whereof etc. this 28th day of August, 1867.”

If the words which we have italicized were omitted there would be no possible basis for construction, for the plain import of the language would questionably show a conveyance to both Fannie and William of the entire tract of two hundred and fifty acres, hence if there is an uncertainty as to whether the grantors intended to convey fifty acres to William and two hundred to Fannie, or whether they intended to convey the entire tract of two hundred and fifty acres to both Fannie and William, it arises solely from the use of the words, “*most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to Fannie*,” between the description of the land granted and the exception therefrom reserved to the grantors. Necessarily the uncertainty thus created, if any, is whether the words last quoted were intended by the grantors to limit, or qualify, or explain the language of the granting clause. That clause is: “We . . . do by these presents . . . hereby convey and sell to Fannie and William the following described tract of land containing two hundred and fifty acres.” It is so clear, unambiguous and positive in its declaration that the grantors convey the en-

tire tract to both Fannie and William that any idea of explanation is not to be considered. The only question, therefore, is whether the force of this direct and unequivocal language is in any way restrained or qualified by the language immediately following it. Having that point in mind, the first thing to suggest itself in reading the possible qualifying clause in connection with the context, is that there are no introductory or connecting words that indicate in any way that it was intended to limit or make more specific the general language of the granting clause. For example, the grantors do not say, "We convey to Fannie and William two hundred and fifty acres, *that is*, to William the most eastern fifty acres which we sold to him and to Fannie the remaining two hundred acres which we gave her." Nor are there any words of similar import used. From the standpoint of grammatical construction the recital is purely parenthetical. Notwithstanding the form of construction, however, if the words on their face carry a meaning inconsistent with the unrestrained meaning of the general terms of the granting clause, they should be given effect, if possible. But do they? The expression "most eastern fifty acres is the land sold to William" as used by the grantors, does not in the face of the positive language to the contrary afford the slightest implication that they were for that reason conveying that fifty to him alone. Nor does the remainder of the expression, "the other two hundred acres we give to Fannie" used in the same connection furnish a basis for an inference that they were conveying the two hundred acres to her alone. That fifty acres had been sold to William and two hundred given to Fannie is entirely consistent with a present conveyance of the whole to both. The word "sold" unaccompanied by words of apter significance, is not ordinarily used as an operative word of conveyance; it may be, however, and will be so considered in a proper setting, or where clearly so intended. But to construe the verb, "is . . . sold," where it occurs in the clause, "most eastern fifty acres is the land sold to William," as relating back to,



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or as used in the same sense as, the operative words of conveyance, "convey and sell," in the granting clause, is a purely arbitrary construction. Neither the thought nor the structure of the context warrant it. Had the concluding part of the clause been, "is the land *hereby* sold," it would plainly show by relation a conveyance of that particular land to William Finley. But the only obvious omission between the words "land" and "sold" is that of the words "that was." If they were supplied, it would make the clause grammatically complete and it would read, "most eastern fifty acres is the land that was sold to William Finley," and we may not arbitrarily insert "hereby" or any similar word not necessarily implied by the context, for to do so would be to make a deed that the grantor did not. What is true of the first part of the recital is necessarily true of its antithetical part, "the remaining two hundred acres we give to Fannie."

The recital is not only parenthetical in structure, but, considered in respect to the thought it conveys in connection with that expressed by the language which precedes and follows it, it seems to be a mental "aside" as well. After stating that they convey to both Fannie and William all of the land, which they describe at length, they incidentally remark, as it were, "most eastern fifty acres is the land sold William Finley the other two hundred acres we give to Fannie." The circumstances of the parties considered it is more than probable that the grantors intended by the recital to amplify their previous statement of the consideration. They were giving their daughter a certain two hundred acres of land as an advancement, her husband had bought fifty acres adjoining for eight hundred dollars, and, for purposes of their own, they desired the deed to recite the entire transaction, and thereby disclose the motives that actuated them in making the conveyance. Had their thought been fully expressed it would no doubt have been somewhat as follows: "most eastern fifty acres is the land sold to William Finley the remaining two hundred acres we give

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to Fannie'' as an advancement, and for that reason we now convey the whole to both, they being husband and wife. But whether this is the correct interpretation of the parenthetical clause or not, the fact remains that the granting clause is clear and unambiguous and because it is unambiguous it cannot be restrained or controlled by the language of a recital following it that is of doubtful and uncertain meaning or application. This is especially true where, as in this instrument, the granting clause is in entire harmony with and supported by the *habendum* clause, if the last clause in this deed may be so designated.

We are further confirmed in the view that the recital is but an amplification of the consideration clause by the fact that there is not in the entire instrument, outside of the recital, a single word or phrase indicating that the grantors were intending to convey severally to the grantees distinct parcels of the land. It is difficult to conceive how the scrivener, whether he was skilled or unskilled, could have written the remainder of the instrument and never used a word that even hinted at a several conveyance of the two.

Considered independently of the language of the deed itself, there is no presumption that the father in giving his daughter the land in controversy intended to convey it to her alone rather than to her and her husband. At the time it was made the ideas of "mine" and "thine" as between husband and wife were not so sharply accentuated as at the present time. The notion of the unity of the property, as well as of the persons, of husband and wife was firmly fixed in the popular mind as it was in the law. It was not unusual for a father when he gave his married daughter personal property as an advancement to deliver it direct to her husband, and when he gave real estate, to deed it to both. In the exceptional case he conveyed it to her sole and separate use.

For the reasons hereinbefore expressed, we deem the conclusion first reached by the learned trial court to be the correct one. Its order granting a new trial is there-

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fore, reversed and it is directed to reinstate the judgment set aside. *Brown and Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., after reargument in Court in Banc, is adopted as the decision of the court. All the judges concur, except *Williamson, Blair and Goode, JJ.*, who dissent, and express their views in an opinion by WILLIAMSON, J.

WILLIAMSON, J. (dissenting).—The conclusion reached in the majority opinion seems to me to be in violation of the intention of the grantors in the deed under consideration. This deed, in reality, is simply two deeds in one. Had it been so in fact, no suggestion of the creation of an estate by the entirety would be tenable for a moment. No intimation of the existence of the relation of husband and wife between the grantees is contained in the deed. The consideration is plainly stated as the "*regard and affection we have for our daughter Fannie*" and "*eight hundred dollars*" from "*William Finley*." There is evidence that the fifty acres was worth about that sum. The grantors are at pains to say that "*fifty acres is the land sold to William Finley*," and "*two hundred acres we give to Fannie*." This deed was the product of an unskilled hand. The writer obviously had about such knowledge as may be derived from an occasional reading of a printed form, and it is hardly to be inferred that even a blank form was before him when he wrote this inartificial conveyance. Such a writer is apt to use such technical terms as he may recall at the moment, in order to give an air of legal knowledge to the document, but he usually has little realization of the significance of the words he employs. To him they are mere matters of form. When he intends, however, to express the controlling thought he has in mind, he naturally drops into the vernacular of the home and the fireside. Hence the blunt declaration of a *sale* to William and a *gift* to Fannie. Had an estate by the entirety been meant, no

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draftsmen, skilled or unskilled, would have been apt wholly to fail to give any clue to that intention. If skilled in the conveyancer's art, he might have contented himself with a recital that the grantees were husband and wife; if unskilled, his meaning would probably have been set forth with the same bluntness shown when he distinguished between a gift and a sale. Even the order in which the words "convey and sell to Fannie and William" are used is significant. Fannie is named first. To her the grantors "convey." William is then named. and to him the grantors "sell." Here was no sale to the daughter nor any gift to him whose relationship to the grantors in any degree, by blood or marriage, is recognized nowhere in the deed. The natural order of use of these words is "sell and convey." That is the usual sequence of events. The inverted form here used, "convey and sell," is alive with meaning when the order in which the grantees are named is considered. Furthermore, a gift to the daughter alone had no tendency to divert the title from the descendants of the grantors. A conveyance to the husband and wife as such (as this conveyance is held to be in the majority opinion) makes possible what has actually happened, namely, the vesting of the title in strangers to the grantor's blood. Nothing in this deed seems to me to foreshadow such an intent. *Blair and Goode, JJ.*, concur.

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CALVIN W. ULRICH, Appellant, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

In Banc, April 1, 1920.

1. **IMPEACHMENT: Place of Residence.** Objections to an inquiry of witnesses for their knowledge of plaintiff's general reputation in a given place, is not an objection to their competency to testify.
2. ———: **General Reputation: In Community.** Plaintiff is subject to impeachment like any other witness, and general reputation is admissible to prove his character as it exists at the time of the

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trial, and reputation, to be competent, must be made up of what is generally said of the witness by those who have sufficient opportunity to observe his life and actions, and ordinarily they are the persons in the neighborhood or community in which he resides, but it is not impossible for him to have a general reputation for veracity in more than one community.

3. ———: ———: ———: **Former Residence.** The discretion of the trial court is not abused by the admission of testimony relating to the witness's reputation in a community in which, beginning nine or ten years previously, he resided for several years, and in which he was widely and generally known and which he frequently revisited and there plied his vocation of selling spectacles and jewelry.
4. ———: ———: **Neighborhood and Community.** The term "neighborhood" or "community" is not susceptible of exact geographical definition, but means in a general way the place where the person has established a reputation, whether that be his present or former residence or place of business. It is not necessarily confined to a particular locality, but may be co-extensive with his residence or place of business, or both, or to places of present and former residence, if he in such places came into such frequent association with persons there as to establish a reputation. In the absence of a showing to the contrary, the inquiry as to his reputation should be confined to the neighborhood of residence; but where there are additional facts to show the establishment of a reputation elsewhere, the court does not abuse its discretion by permitting witnesses to testify what his general reputation in such other place is or was.
5. **INSTRUCTION: Injuries at Other Times and Places.** The trial court did not commit prejudicial error in instructing the jury that the mere fact that plaintiff at some time may have sustained broken ribs and other injuries was not proof that he was injured at the time and in the manner asserted by him, if there was direct testimony that he was neither on nor within several feet of defendant's car at the time he claims to have been injured and he did not call a doctor or notify defendant for four months thereafter.
6. ———: **Conflicting.** An instruction authorizing the jury to find for defendant if they believe "from all the facts and circumstances in the case" that plaintiff had not received any injury is not in conflict with another for defendant requiring plaintiff to make out his case "by the greater weight of the credible evidence in the case." They do not set up different standards of the weight of evidence requisite to warrant a finding, but the one places the burden on plaintiff and the other presents the matter from the point of view of defendant, on whom rests no such burden.

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7. ———: **Expert Testimony: No Injury.** Error in an instruction concerning expert testimony is not prejudicial, where the testimony has reference to the character, extent and permanency of plaintiff's injury and spends its force on the issue as to the amount of damage, and the jury finds that he was not injured by defendant at all. Besides, the instruction here complained of was, in substantially the same form, approved in *Hoyberg v. Henske*, 153 Mo. 1. c. 75, and numerous later cases.
8. ———: **To Disregard Testimony.** An instruction for defendant telling the jury that they were authorized to disregard testimony, if any, opposed to obvious physical facts or in contradiction of the common knowledge and experience of mankind, was not prejudicial under the facts of this case, where both court and jury had full opportunity to observe whether plaintiff's actual physical condition and conduct accorded with his testimony.
9. **FAIR TRIAL: No Exceptions.** Where no objection was made to the admission of testimony that plaintiff's pretended injuries were simulated, no request was made that defendant's counsel be rebuked for their conduct or that the jury be discharged, and no exceptions were taken to the conduct of the trial in the manner complained of on appeal, it cannot be ruled that plaintiff was not afforded a fair and impartial trial.

Appeal from Knox Circuit Court.—*Hon. James A. Cooley*, Judge.

**AFFIRMED.**

*L. F. Cottey* and *James C. Dorian* for appellant.

(1) On the trial the defendant introduced four witnesses from Putnam County, who severally testified, against the objections of counsel for plaintiff, that they were acquainted with the general reputation of plaintiff, in the eastern part of Putnam County, for honesty, truth, veracity and morality, and that it was bad. These witnesses also testified that the plaintiff had not lived in Putnam County for about ten years, but that he had lived in Moulton, Iowa, for the past seven or eight years and that was his home. These witnesses had never lived in Moulton, and did not claim or pretend to know or testify as to the reputation of plaintiff in Iowa. We

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insist that the court erred in overruling our objections to the testimony of said witnesses. *State v. Shouse*, 188 Mo. 478; *State v. Parker*, 96 Mo. 390. (2) Instructions should fairly submit the issues presented by the pleadings and the evidence. "The jury should try the case according to the law and the evidence, and not otherwise. While a jury is entitled to draw inferences, they must be deduced from the testimony, not from conjecture. The evidence is that plaintiff was injured while trying to board defendant's car at Mine No. 1, as alleged in his petition. There is not a glimmer of evidence, near or remote, that plaintiff received the injuries he complains of at any other time or place. Instructions 2 and 3 given at the request of defendant are erroneous and constitute prejudicial error. *Fleever v. Railroad*, 216 Mo. 209; *Willmott v. Street Ry. Co.*, 106 Mo. 535; *Crow v. Railroad*, 212 Mo. 610; *McElvain v. Railroad*, 151 Mo. App. 148. (3) Defendant's Instructions 4 and 5 are in conflict. Said Instruction 4 correctly stated the law, but said Instruction 5 did not. Each one authorized a verdict for the defendant. Said Instruction 4 and 5 are separate and independent declarations of law, and are directly in conflict, one of them declaring the law correctly, the other erroneously. This court cannot determine by which one the jury was guided. The error is manifest and prejudicial. *Shepard v. Transit Co.*, 189 Mo. 373; *Mansur-Tebbetts Imp. Co. v. Ritchie*, 143 Mo. 612; *Mining Co. v. Fidelity & Casualty Co.*, 161 Mo. App. 208; *Ross v. Street Ry. Co.*, 132 Mo. App. 481. (4) Defendant's Instruction 6 is erroneous and should not have been given in this case. Said instruction, in effect, destroys the probative force of the evidence of the witnesses, Drs. Prince and Downing, who testified for the plaintiff in their professional capacity, and also operated on him. There was no objection to their competency to testify as medical experts. They were competent witnesses; and their testimony is of probative force because they were the attending physicians. 14 Ency. Ev. p. 369. A further objection to said Instruction 6 is that

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it does not direct the jury to consider the testimony of said expert witnesses in connection with the other evidence in the case. *Rose v. Spies*, 44 Mo. 23; *City of Kansas v. Butterfield*, 89 Mo. 648; *Smith v. Tel. Co.*, 113 Mo. App. 443. Said Instruction 6 is based on the assumption that the jury was as well qualified to judge about the injuries plaintiff was complaining of, and their effect, as the attending physicians who examined plaintiff and operated on him to save his life. That was manifest error, because this is not a case that is within the knowledge and common sense of the average layman. *Ewing v. Goode*, 78 Fed. 442. (5) Defendant's Instruction 7 is erroneous under the evidence. *Phippin v. Mo. Pac. Ry. Co.*, 196 Mo. 343. There is no evidence in the instant case that any witness testified to a state of facts in opposition to obvious physical facts or contradictory to the common knowledge or experience of men. The giving of said instruction was not only erroneous, but it was prejudicial error. (6) The court erred in not affording the plaintiff a fair and impartial trial on the issues raised by the pleadings in this cause. *D. G. Co. v. Williams*, 176 S. W. 476; *Wright v. Kansas City*, 187 Mo. 678; *State v. Rogers*, 108 Mo. 204; *State v. Gessell*, 123 Mo. 535; *Whart. Cr. Ev.* (9 Ed.) p. 472; *State v. Parker*, 96 Mo. 382; 1 *Greenleaf*, Ev. p. 259; *State v. Houk*, 169 Mo. 654.

*J. G. Trimble and Campbell & Ellison* for respondent.

(1) The evidence of the witnesses that plaintiff's reputation in Unionville and the east part of Putnam County, at which place he had lived for some forty years before he moved to Moulton, was bad, was admitted without objection. The so-called objection is not an objection, but a mere argument. *Williams v. Williams*, 259 Mo. 250. Granting the question as to whether the witness was acquainted with the plaintiff's general reputation was erroneous, and that sufficient objection was made, still such error was harmless. The question



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that followed the one last mentioned was, "What was that reputation, good or bad?" No objection was made to that question in the trial court. *St. Louis v. Railroad*, 248 Mo. 25; *Semple v. Railroad*, 152 Mo. App. 29; *Rice v. Waddill*, 168 Mo. 120; *Stoner v. Royar*, 200 Mo. 454; *State v. Diemer*, 255 Mo. 350. (2) Counsel now assert the evidence of plaintiff's general reputation in Putnam County was too remote. That objection was not made below and cannot be urged here. *City of St. Louis v. Company*, 248 Mo. 10. (3) The evidence was admissible no matter what objections were or could have been made. The evidence in this case reveals that plaintiff from youth to past middle life lived in the east part of Putnam County and that his conduct was such that he became a notorious character in that part of the country. After he passed middle life he moved to Moulton, Iowa, a distance of only a few miles. Thereafter, and until the time of the trial, he passed through Putnam County frequently and visited his step-daughter and plied his trade of selling spectacles and jewelry. We concede that a man who has acquired a bad reputation may reform, but there is, in this case, no evidence of reformation on the part of the plaintiff. The whole evidence in this case, considered, reveals the plaintiff is pursuing the sort of life that earned the reputation the witnesses gave him in the home in which he lived for more than forty years. He became so notorious that when he returned to his old home in Putnam County his very presence revived unfavorable talk about him. *Coates v. Sulau*, 26 Pac. 720; *Hamilton v. People*, 29 Mich. 195; *Stratton v. State*, 45 Ind. 468; *Mitchell v. Com.*, 78 Ky. 219; *Willard v. Godenough*, 30 Vt. 393; *State v. Lanier*, 79 N. C. 622.

BLAIR, J.—This is an action for damages for injuries appellant alleges he sustained by reason of negligence of servants of respondent in charge of one of its trains. There was a verdict against appellant. The injury is alleged to have occurred November 29, 1911.

Two previous actions were instituted and dismissed before this one was begun. There was a previous trial, or mistrial, in this case.

Appellant claims that while he was attempting to board respondent's train at Mine No. 1 in Adair County, other cars were permitted violently to strike the car he was getting upon and that he was thrown and injured. There was evidence tending to prove injury due to the cause alleged. Respondent offered evidence tending to prove appellant was not injured at all at the time and place or in the manner alleged. There was testimony offered to impeach appellant, and he employed the same weapon against some of respondent's witnesses.

Appellant complains that the trial court erred in (1) admitting certain impeaching testimony; (2) instructing the jury; and (3) so conducting the trial that it was unfair to appellant.

With respect to the first assignment the evidence tends to show that for many years prior to 1907 appellant had lived in the eastern part of Putnam County, Missouri; in 1907 he left Putnam County, and for a year or so had no established place of residence; he was in various States for short periods; in 1908 he established his headquarters in Moulton, Iowa, his wife staying there, and about 1910 he went to housekeeping in that town; he traveled about selling spectacles and jewelry; after moving out of the eastern part of Putnam County he continued frequently to revisit it and pass through it and ply his vocation there; Moulton is but a few miles north of the eastern part of the north boundary of Putnam County; respondent offered testimony to show appellant's reputation was bad in Moulton at the time of the trial, in 1916, and then offered testimony tending to show **his** reputation in the eastern part of Putnam County where he formerly lived was bad at the time of the trial and had been at the time he left the county.

Other facts are stated in connection with the discussion of questions to which they are relevant.

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I. Upon the question concerning the impeaching testimony of which he complains, appellant states in his brief that the objections he made on the trial were to the competency of the witnesses "to testify; and not as to what they would testify to." This construction of his objection is relied on by appellant to break the force of respondent's contention that he entirely failed to object on the trial to testimony as to his reputation, the admission of which he now assigns for error. He states his position to be that the witnesses "disqualified themselves to testify as to the reputation of appellant in Putnam County when they admitted he had not lived in that county" for a number of years. The impeaching witnesses were not asked, at the time the objections were made, concerning appellant's reputation at some past time, but the question put and objected to related to appellant's reputation in the eastern part of Putnam County at the time of the trial. It is apparent from this that the objection raises no question concerning the proper exercise of the trial court's discretion in admitting evidence of reputation at a former time, but presents, at most, a question of *place* of reputation. [Veitinger v. Winkler, 8 Mo. App. l. c. 562; State v. McLaughlin, 149 Mo. l. c. 31, 32.] As a witness, appellant was subject to impeachment like any other witness. Viewed as an instrument of evidence, the improbability that a witness will tell the truth is relevant matter. This is affected by his character as it exists at the time of the trial. His character thus becomes a proper subject of attack. General reputation is admitted to prove his character. This reputation, to be competent, must be made up of what is generally said of the witness by those who are regarded by the law as having sufficient opportunity to observe his life and actions. Ordinarily, these are they "among whom he dwells, or with whom he is chiefly conversant; . . . a man's character is to be judged by the general tenor and current of his life and not by a mere episode in it. [Per BRACE, J., in Waddingham v. Hulett, 92 Mo. l. c. 534.] Usually

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those who reside in the "neighborhood" or "community" in which a witness resides are assumed to have the sort of opportunity to observe him which will enable them to speak justly of his character, and thus form the reputation which will correctly evidence it. This assumption is made because it is the usual order of things. It is obvious that instances are easily conceivable in which the people of the neighborhood of the residence of a witness might have scant opportunity for contact with him; while in some other community he may spend his days and transact his business, and the people there be afforded every opportunity to form and express a just opinion. Nor is it impossible for one to have a general reputation for veracity in more than one community. Now, appellant's objection to the competency of the witnesses raises the question, if it raises any, whether they had shown themselves qualified to speak of a reputation which was the result of what was generally said by persons in such contact with appellant that they were afforded opportunities to observe him and his course, of the kind which the law requires before it recognizes reputation, resulting from what they say, as competent.

In this case appellant had lived at Moulton for several years. Some nine or ten years before he had lived in the eastern part of Putnam County and was generally and widely known by the people there. Moulton was but a few miles from the eastern part of Putnam County. County and State lines, as such, do not materially interfere with the spread of reputation. Appellant frequently revisited his old home and continued to ply there his vocation of spectacle and jewelry selling. He was still well and generally known in that community, as he had been for a great many years. With respect to the objection as to place of reputation, the trial court had a discretion to exercise which cannot be reviewed unless it was obviously abused. We cannot hold it was abused in this case. In *Houk v. Branson*, 17 Ind. App. 1. c. 121, the reputation of a witness was proved to be bad in Crawfordsville, where he then lived. Other

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evidence that his reputation in his old home in the same county, where he lived several years before and which he frequently visited and where he continued to be known, was held admissible.

In *Hauk v. State*, 148 Ind. l. c. 261, testimony was offered to show that the reputation of the witness in Covington, his home at the time of the trial, was bad. Testimony was then offered to show that the reputation of the witness at Hillsboro, fifteen miles away, where the witness lived fifteen months before, was also bad. It appeared that the witness was a doctor (as here) and continued to practice (as here) in the place of his former residence. The court held the testimony admissible.

"The general rule is that, in order to impeach a witness by proof of bad character, the predicate is a knowledge of his character in the community or neighborhood in which he resides; but the term 'community' or 'neighborhood' is not susceptible of exact geographical definition, but means in a general way where the person has established a reputation. The inquiry is not necessarily confined to the domicile of the witness, but may extend to any community or society in which he has a well-known or established reputation. It is a matter of common knowledge that many men have their domiciles at one point and business at another, spend much of their time at the latter, and, in fact, have a better established reputation there than at the place of their actual domicile." [*Baer & Co. v. Cooperage & Box Mfg. Co.*, 159 Ala. l. c. 502, 503.] In this case the reputation in Mobile of a witness domiciled in Baltimore was admitted.

"A man's 'neighborhood' is not necessarily confined to the particular locality in which he resides, but is co-extensive with the extent of territory occupied by those with whom he associates and frequently comes in contact; one man's 'neighborhood' may be a small hamlet, while the neighborhood of another may be a county or state." [*Peters v. Bourneau*, 22 Ill. App. l. c. 179, 180.]

The word "neighborhood" comprises "the territory wherein the person in question resides, moves, circulates,

does business and has intercourse with his fellows." [People v. Loris, 131 App. Div. 1. c. 129.]

In *State v. Henderson*, 29 W. Va. 1. c. 167, the court upheld the admission of testimony that the reputation of defendant was bad in his old home community, whence he had removed seventeen years before, but in which he was well known and in which he continued to transact business and visit frequently. The court said: "The manifest object of the rule is to find out the general reputation of the person sought to be impeached or sustained; and certainly where a man is well known, he has a reputation either for honesty or dishonesty. Anyone, who is well acquainted with those with whom such a person associates, and who know him well, is competent to speak of the reputation he has among them."

In *Boswell v. Blackman*, 12 Ga. 1. c. 593, it was proposed to prove the general reputation of the witness "in Russell County." The Supreme Court of Georgia said: "Disconnected with any other proven facts, I should hold that the last named question would not do; but before putting it, the plaintiffs in error had proven, by the impeaching witnesses, that they had known the witness sought to be impeached, for the last eight or ten years, in the County of Russell, Alabama; that he was generally known, and had a general reputation in the county. These things being true, the question propounded comes within all the reasons upon which the other question is held proper. The impeachment must be by persons acquainted with the witness. And they are called to speak of his general character for truth and veracity—not the world over, or in London, or Paris, or Columbus, but in that circle where his real character is best known, to-wit: in the neighborhood where he lives. Now, when a witness is generally known, and has a general reputation in a county, that county may be fairly considered his vicinage; it is fair to infer, under such circumstances, that his true character for truth is as well known in that county, as men's character for truth is known ordinarily in their neighborhood."

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In *Powers v. Presgroves*, 38 Miss. l. c. 241, 242, it was said: "The rule in relation to proof of character is, that the inquiry must be made as to his *general reputation, where he is best known*—what is *generally said of* him, by those among whom he dwells or with whom he is chiefly conversant. Ordinarily, the witness ought to come himself from the neighborhood of the person whose character is in question. But the court, unless under peculiar circumstances, will not undertake to determine, by a preliminary inquiry, whether the impeaching witness has sufficient knowledge of the fact to enable him to testify; but will leave the value of his testimony to be determined by the jury. [1 Greenleaf, Ev. 601, sec. 461.] What is the plaintiff's 'neighborhood,' whether one, or five, or ten miles, and the credit to be given to the witnesses, near or remote, or the character he bears in the compass of one mile, or in the county in which he lives, are all questions, under the limitations above stated, to be considered and determined by the jury, in arriving at his *general character*."

In *State v. Cushing*, 14 Wash. l. c. 535, the court held it error to exclude certain impeaching testimony, saying: "If in the course of business or otherwise Newman had acquired a reputation for truth and veracity in the City of Spokane, it was competent to be given in evidence, although his place of residence may have been distant therefrom some five or six miles, as shown."

Mr. Greenleaf, in a passage frequently approved by this court, states that a witness to reputation "must be able to state what is *generally said of* the person, by those among whom he dwells, *or with whom he is generally conversant*."

It is apparent that any rule which would draw an arbitrary line about the spot of the residence of every witness, and by this method fix the place of origin of competent reputation, would not only violate the principle upon which reputation is admissible to prove character, but would be absurd in the extreme. With respect to such place of origin, the trial court has some discretion.

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In the absence of any showing to the contrary, it is doubtless proper to confine the inquiry to the neighborhood of residence. In this case there were sufficient additional facts to justify the admission of the testimony. Its weight was then for the jury, and the distance of appellant's present place of residence was a matter to be considered by them in that connection.

The case of *State v. Shouse*, 188 Mo. 1. c. 478, is cited by appellant. That case decides, it seems, that when there is evidence of good reputation at the place of residence at the time of trial and no evidence of bad reputation at that time, evidence of bad reputation in another State some seven or eight years *prior to the trial* is not admissible, on the ground that time for reformation had intervened, citing 1 Greenleaf, Evidence, sec. 459, and Missouri cases. That is not this case. Here the testimony, so far as concerns the questions to which the objections were made, had to do with appellant's reputation at the time of trial. The case more resembles *State v. Miller*, 156 Mo. 78, which is distinguished in *State v. Shouse*. In this case appellant's objection was, as he expressly states, made to the competency of *the witnesses*, "as to their competency to testify; and not as to what they would testify to." The question concerning the remoteness in time of reputation is not in this case.

II. The court instructed the jury, in substance, that the mere fact that appellant at some time may have sustained broken ribs and other injuries was not proof that he was injured at the time and in the manner he claimed. Appellant does not contend there was anything in the character of his injuries which pointed to injury by a railroad accident rather than some other. As we understand it, his objection is that the court submitted an issue not made by the evidence. He says: "There is not a glimmer of evidence, near or remote, that plaintiff received the injuries he complains of at any other time or place." There was

Other  
Injuries.



direct testimony of several witnesses tending to show appellant was neither on nor yet within several feet of respondent's car at the time he claims to have been injured by its sudden movement. He first called a doctor about four months after the day on which he now says he was hurt. He notified respondent of his claim at yet a later date. Whether he was injured at the time and place he states and by respondent's car was the dominant issue in the case. The contention he makes must be overruled.

III. It is insisted respondent's Instructions 4 and 5 conflict and that the conflict is prejudicial. The question raised pertains to the requirements in these instructions respecting the weight of the evidence necessary to justify a finding. It is conceded Instruction 4 is correct in requiring appellant to make out his case "by the greater weight of the credible evidence in the case." It is argued that Instruction 5, in authorizing the jury to find for *respondent* in case they believed "from all the facts and circumstances in the case" that appellant had *not* received any injury," etc., is drawn into conflict with Instruction 4, in this, that it sets up a different and incorrect standard as to the weight of evidence requisite to warrant a finding. This objection overlooks the fact that Instruction 4 has to do with the burden upon appellant, and Instruction 5 presented the matter from the point of view of respondent, upon whom no such burden rested. Further, the omission of the phrase respecting the necessary weight of evidence, even from an instruction in which it could properly be used, is not necessarily reversible error. [Norris v. Railroad, 239 Mo. l. c. 717, 718.]

IV. The instruction concerning expert testimony was in substantially the same form as that approved by Court in Banc, in the face of the same objections made

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here, in *Hoyberg v. Henske*, 153 Mo. l. c. 75, 76. This decision was followed in *Markey v. Railroad*, **Expert** 185 Mo. l. c. 364; *Burns v. Ice & Fuel Co.*, **Testimony.** 187 S. W. 148, 149, and *Gold v. Jewelry Co.*, 165 Mo. App. l. c. 166. In addition, the expert testimony had reference to the character, extent and permanence of appellant's injury, and spent its force on the issue as to the measure of damages. The jury found appellant was not injured by respondent at all. In view of this the instruction becomes unimportant.

V. The court gave an instruction which, in substance, authorized the jury to disregard testimony, if any, opposed to obvious physical facts or in contradiction of the common knowledge or experience of mankind. Appellant founds his criticism of this instruction upon a recapitulation of the testimony, pro **Disregarding** and con, upon the question whether he was **Testimony.** upon the car or standing some five or six feet away from it when the shock came. The instruction had no reference to this testimony. There was testimony tending to show that after the time he alleged he was injured most seriously, appellant was seen to be walking and conducting himself in a manner which his experts conceded, if true, would disprove his claim in vital respects. Further, he offered evidence that designated muscles were so completely paralyzed that he had entirely lost control of certain organs of elimination. If his testimony was true, the evidence of these things must have obtruded itself upon the jury. Both the trial court and the jury, during the *four days* of the trial, had full opportunity to observe whether appellant's actual condition and conduct accorded with his testimony in this connection. There was evidence that appellant, if suffering from the injuries and conditions he claimed, would present a described physical appearance. The jury saw him and could judge for themselves whether his appearance corroborated or disproved his claim. In the circumstances the instruction is not open to the criticism made.

VI. Appellant contends he was not afforded a fair and impartial trial. There was ample testimony of eye witnesses tending to show that he was not on respondent's car at all at the time it was moved; that he was not injured by the car and that he simulated conditions of injury which did not in fact exist. This contention is based, in the main, upon questions put to appellant and offers of proof which are said to have prejudiced him with the jury. The trial court consistently ruled with appellant upon his objections, and, at his request, excluded the jury when one question of evidence was being discussed. Its exclusion was not asked at any other time. The trial court was not requested to rebuke respondent's counsel for the conduct of which complaint is now made, nor did appellant request that the jury be discharged, but proceeded to verdict with his case. No exceptions were taken on the ground now relied upon. In these circumstances the contention cannot be sustained.

VII. What has been said disposes of the questions presented under our rules (*Simmons v. Affolter*, 254 Mo. l. c. 174; *Orchard v. Missouri Lumber & Mining Co.*, 184 S. W. l. c. 1139), and the judgment must be affirmed. All concur except *Woodson, J.*, who dissents.

# INDEX.

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## ACCOUNTS.

1. **Account Rendered: Implied Acquiescence and Promise.** An account rendered, showing a balance claimed by the creditor, unless objected to by the debtor within a reasonable time, is evidence that the debtor assented to it as correct and of an implied promise to pay the balance shown by it; and the rule applies to principal and agent, and to other persons who have business relations with each other, as well as to merchant and customer, or dealings between merchants. *Dameron v. Harris*, 247.
2. ———: ———: **Reasonable Time.** What constitutes a reasonable time in which to object to an account rendered depends on the circumstances of the particular case. One circumstance is the local situation of the parties. Acquiescence for a whole year, without objection by the female owner of a large farm, in the itemized accounts rendered by her agent accompanied by a letter explaining her overdraft and the amount credited on her note for money advanced by him, and calling attention to the balance, together with other letters written in the subsequent months to each other in which reference is made to the state of the account, amounts to an account stated, and in the absence of fraud, mistake or accident forecloses a readjustment. *Ib.*
3. ———: ———: **Readjustment: Continuous: Fraud or Mistake.** Acquiescence in an account stated does not preclude one of the parties from showing that certain items were not embraced in it, if a proper suit is brought to amend the adjustment for fraud, mistake or accident; but such a suit must proceed upon the theory that the account had been adjusted and items omitted which should have been included; if the demand is based on the theory that the account was a continuous one for twenty years, with no adjustment of it at any time, the only question of inquiry is whether there had been periodical settlements within those years, with such acquiescence given for a reasonable time under the circumstances as rendered them accounts stated, and if the facts establish those things the settlements cannot be reopened. *Ib.*
4. ———: **Continuous: Periodical Settlement: Limitations.** The character of an account as a continuous or running one ceases at each periodical settlement thereof, and the Statute of Limitations commences to run from the date of the settlement against the implied promise to pay the balance shown thereby to be due. *Ib.*
5. **Account Book: Entries by Amanuensis.** Entries made by the agent or under his direction, systematically, in the usual course of business and as minutes of the business, at the time the transactions occurred or as nearly so as the circumstances of the business will reasonably admit whether made with his own hand or by other persons who wrote in his presence and pursuant to his

## ACCOUNTS—Continued.

orders, are regular and original entries, and the book in which they were made is competent evidence, in his favor and against him. *Dameron v. Harris*, 247.

6. **Account Book: Contemporaneous.** Regular entries in an account book made in the course of business to be competent as evidence and an exception to the rule against hearsay must be made at the time of the transaction noted, or soon enough after the event to be in the nature of *res gestae* and to render it unlikely that they were the result of a design to defraud, concocted by the entrant after the occurrence. But if they were made immediately following the transaction if it occurred in the office where the account book was kept, or promptly after the agent's return thereto from the place where the business was transacted, they are substantially contemporaneous, and competent. *Ib.*
7. **Agent's Compensation: In Excess of Agreement: Acquiescence.** Unless the owner assented to a charge of one hundred dollars annually instead of fifty dollars for the services of her bailiff in managing her large farm and protecting her financial affairs, he was bound by his contract, regardless of the importance and onerousness of his duties. But where the increase was indicated in the itemized accounts rendered, the value of the services far exceeded the compensation, and the evidence clearly establishes that she acquiesced in the increased charge, he is not chargeable with such increase. *Ib.*
8. **Professional Services: Mechano-Therapist: No License.** A mechano-therapist, having no license to practice, cannot recover for his services as "a practitioner of drugless healing" and of "the chiropractic method." [Approving and adopting opinion of Springfield Court of Appeals in *O'Bannon v. Wydick*, 197 S. W. Rep. 432.] *O'Bannon v. Wydick*, 478.

ACQUIESCENCE IN RUNNING ACCOUNT. See *Account*, 1 to 4.

## ACTIONS.

1. **Violation of Ordinance: Civil or Criminal Proceeding.** While a prosecution for a violation of a city ordinance regulating the use of streets is technically a civil proceeding, yet in so far as it authorizes the imposition of a penalty upon conviction it partakes of the nature of a criminal action, and the validity of the ordinance is subject to the same rules of construction as is a criminal statute. *Ex parte Lerner*, 18.
2. **Taxes: Assessed in Name of Another: Owner's Remedy.** The statutory corrective for the failure of the assessor to discharge his duty in carefully entering the names of the owner in the "real estate book" is an action on his bond. The validity of the assessment is in no wise dependent upon his failure to use diligence to ascertain the name of the owner at the time the assessment is made. *State ex rel. McKee v. Clements*, 195.
3. **Assignment: Cause of Action: Stipulation as to Settlement: Substitution.** An action in ejectment pending in the proper court, with a stipulation on file between all the parties agreeing to a final disposition of the case, is assignable, and a conveyance by quit-claim deed, executed by plaintiffs, in which they convey to a named grantee all their right, title and interest in the land and to the damages for rents and profits, is such an assignment, and

## ACTIONS—Continued.

- entitles the grantee to be substituted as plaintiff, unless the cause of action had already been lost for some other reason. Norton v. Reed, 482.
4. ———: **Dismissal.** Where a cause of action is pending on a stipulation for judgment and is assigned by the plaintiffs, together with all their interests in the property in suit, the court should not permit plaintiffs, upon the payment of costs, to dismiss the action, without the consent of the assignee. *Ib.*
5. ———: ———: **Reinstatement: Writ Coram Nobis.** After the adjournment of the term, a case wrongfully dismissed cannot be reinstated by motion under Secs. 2119-2121, R. S. 1909, if there is nothing on the face of the record indicating that error had been committed. But if the motion is in the nature of a writ of error *coram nobis*, and points out a mistake made by the court, without the fault of movent, based upon a misapprehension of the actual facts, which, if known to the court at the time, would have precluded a dismissal, the cause may be reinstated in response thereto; for the purpose of a writ of error *coram nobis* is to enable the court to correct some error of fact, which did not appear in the record and which was unknown to the court when the order was made. *Ib.*
6. ———: **Unsigned and Amended Petition: Conveyance by Defendant: Stipulation for Judgment.** The filing of an unsigned petition is the commencement of a suit, and the filing of an amended petition at the return term relates back to the filing of the original petition; and a suit in ejectment is properly brought against the owner and his tenant in possession; and if, after such amended petition is filed, the attorneys who sign it and the attorneys for defendants enter into and file in the case a stipulation for judgment in accordance with a final adjudication in another pending cause resting upon the validity of the same administrator's deed, such stipulation is binding on all the parties and their assignees, although one day before the suit was brought the defendant, by a deed not recorded until one day thereafter, had conveyed to intervener; and intervener is in no better position than he would be had the original petition been properly signed. *Ib.*
7. ———: **Ejectment Against Grantor: Stipulation for Judgment.** The purchaser from the defendant in ejectment, by deed executed one day before suit is filed but not recorded until one day after, is, under the statute (Sec. 1732, R. S. 1909), entitled to be joined as codefendant and to defend his title, or to have it defended in the name of the original defendants. And if a stipulation is signed by the attorney for the original defendants that the action shall remain on the docket and abide the result in another pending suit, he and his grantee are bound by the stipulation. *Ib.*

## ADMINISTRATION.

1. **Sale of Interest by Heir: Voluntary Conveyance by Other Heirs to Pay Debts.** The joining by non-indebted heirs of an estate in the course of administration, in a private sale and conveyance of other estate lands, to obtain money with which to pay debts primarily those of another heir, but allowed against decedent's estate, and the payment thereby of such debts, cannot be considered as a voluntary loaning by such heirs to such debtor

## ADMINISTRATION—Continued.

heir or to the estate of the money to pay his or its debts, but are acts in their nature coercive, brought about by his delinquency, and neither he, nor another claiming his interest in another tract as purchaser at the foreclosure of a deed of trust made by him after decedent's death to pay his individual debts, can take advantage of a situation brought about by his wrong. An heir indebted to decedent's estate, by reason of decedent's suretyship for him or otherwise, has in equity against the other heirs no definite share or interest in the estate, unless he pays such indebtedness, and failing to do so his interest or share is cut down to the extent of his debts to the estate; and the purchaser at the foreclosure of a deed of trust, by which he conveys his interest in the remaining lands to secure the payment of an individual debt, takes subject to the right of the other heirs, who have conveyed estate lands to pay estate debts, to be reimbursed out of his original share in such lands. *Ridings v. Bank*, 288.

2. **Sale of Interest by Heir; Contribution; Final Settlement; Estoppel.** Heirs who assist the administratrix to pay estate debts, whereby she is enabled to make final settlement and be discharged, are not estopped to compel contribution, to the extent of a debtor heir's interest in estate lands conveyed by him to pay his individual debts. The grantee in such conveyance is not an innocent purchaser; a final settlement only indicates that there are no unsatisfied estate creditors, and such assistance is not voluntary. *Ib.*
3. **Administrator De Bonis Non; Partition.** In a suit for partition brought by heirs, whether or not the appointment of an administrator *de bonis non* was void or valid need not be determined, since he is not a necessary party. *Ib.*
4. **Presentation of Claims; Limitations; Exhibition to Administrator Within Six Months.** Section 195, Laws 1911, page 82, does not mean that the exhibition of a demand against the estate to the administrator for allowance within six months will alone stop the running of the special statute of limitations. A claimant cannot avail himself of the fact that he exhibited his demand, by notice and in due time, to the administrator, unless he also presents it to the court for allowance within the time prescribed by the statute. *Home Ins. Co. v. Wickham*, 300.
5. ———: ———: ———: **Presentation to Court.** The Legislature did not intend by the amendatory Act of 1911, by striking out of Section 195 the words explicitly requiring demands to be presented to the court for allowance and substituting the words explicitly requiring it to be exhibited to the administrator for allowance, to make the section simply a reiteration of the requirement of Section 191, as amended, that a demand must be exhibited against the estate as provided in clauses five and six of Section 190, as amended, or be forever barred, but did intend to require a second exhibition to the administrator, the first being for the purpose of obtaining priority of classification, and the second for the purpose of having it allowed. Said Section 195, as amended, requires a demand to be presented to the court for allowance. At all times prior to 1911 and since 1855 two kinds of limitation sections have run along side by side in the Administration Statute, each serving different purposes and each indispensable and distinct from the other, the one requiring demands to be exhibited to the administrator within a designated period, and the other

## ADMINISTRATION—Continued.

requiring them to be presented to the court for allowance within a designated time. *Ib.*

6. ———: **Exhibition to Administrator for Allowance.** The words "for allowance," used in Section 195 of the Administration Act of 1911, requiring the claimant to "exhibit his demand to the administrator in the manner provided by law, for allowance," are not positive enough to empower the administrator to allow a demand against an estate, or to imply that such power already existed. Demands must be established by the judgment of a court, and the requirement that a demand be exhibited to the administrator for allowance means an exhibition to him in a proceeding in court to have the claim allowed. *Ib.*
7. ———: **Manner of Exhibiting Demand.** Exhibition of a demand to the administrator for allowance means an exhibition to him in a proceeding in court, and this proceeding can be by an action in court in the ordinary mode, or by presentation to the probate court. If the exhibition is by presentation to the probate court, the proceeding is initiated in the manner provided by the statutes, namely, by the claimant delivering to the administrator, ten days in advance of the term at which he intends to present the claim, a written notice and copy of the instrument of writing or account on which the claim is founded, with a statement that it will be presented for allowance at the next regular or adjourned term. *Ib.*
8. ———: **Dismissal: Reinstated Within a Year.** Where the demand was exhibited to the administrator within six months after letters granted, and presented to the probate court more than six months after the last publication of notice, and then dismissed, a suit brought in the circuit court within one year after such dismissal, but more than one year after letters granted, or the last published notice, is barred by limitations, under the Act of 1911. The special limitation statute contained in said act controls, and the provision in the general limitation statute that a new action may be begun within one year after such dismissal does not apply. The exhibition of the demand to the administrator within six months does not stop the running of the special statute (Sec. 195, Laws 1911, p. 82) requiring the demand to be presented to the court for allowance "within one year after the granting of first letters on the estate, or the last insertion of the publication of notice of the grant of such letters." *Ib.*
9. ———: **Inconsistencies in Section 195; Exception.** The second part of Section 195 of the Administration Act of 1911, permitting exhibition of a demand to the administrator at the usual term for final settlement, seems inconsistent with the first clause, which requires claims to be exhibited within a year from the granting of letters, since final settlement can occur no sooner than "the first regular term of the court after the expiration of one year." But said second part may be regarded as contemplating an exception to the regular procedure, and to allow a proceeding, commenced within the year, to be followed up in court as late as the term next succeeding the one at which final settlement would otherwise occur. The purpose was to permit a claimant whose second exhibition was within the year, but too late to follow it up in court within the year, to have a term, but only one, after the one for final settlement, to present it to the court; whereas a



## ADMINISTRATION—Continued.

claimant who gave earlier notice under Section 203 would need no such grace. This ambiguity in Section 195, however, was cured by the amendment of 1917, Laws 1917, page 98. *Home Ins. Co. v. Wickham*, 300.

10. **Widower's Share: Note to Deceased Wife: Estoppel.** When the appointment of an administrator upon a deceased wife's estate is legally dispensed with, a note for \$500 payable to her, being her sole property, becomes the absolute property of her husband as her widower; it could not have been given away by her, nor willed away, nor taken by her creditors. If its payment is to be avoided in a suit thereon by her widower, the maker must either establish payment prior to her death, or plead and establish such an application, with the husband's acquiescence, of an equal amount of money after her death, as amounts to an estoppel, such as the payment of her funeral expenses. *Parsons v. Harvey*, 413.
11. **Constitutional Law: Sec. 10, R. S. 1909: Orders Made in Vacation.** Section 10, Revised Statutes 1909, authorizing the probate court, or judge thereof, in vacation, to refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children, is not violative of any provision of the Constitution. It gives to creditors and other interested parties opportunity to challenge the order by timely action in court; and, besides, the action of the court is not in strict sense judicial, but the statute is similar to many others enacted for the public convenience and to simplify the business before such courts, at a minimum cost, without injury to any one. *Ib.*

## AGREED STATEMENT.

**Omissions and Ambiguities.** An agreed statement of facts upon which the case is submitted to the jury stands in lieu of a special verdict, and if it contain any ambiguity, or any fact necessary to a recovery is omitted, a judgment for defendant will on appeal be affirmed. *Byers v. Essex Inv. Co.*, 375.

## APPEALS.

1. **Adverse Possession: Conflict in Testimony.** Where plaintiff in the suit to quiet title and ejectment had no record title, and the evidence as to whether it used the property in connection with other property possessed by it to create title by adverse possession was in dispute, the finding of the trial court settles the question on appeal. *Hayti Devlp. Co. v. Clayton*, 221.
2. **Non-resident Insurance Company: Twenty Days' Notice.** A foreign insurance company, licensed to do business in this State, but having no agent, office or other place of business in the county in which the cause was tried before a justice of the peace, has twenty days, under the statute (Sec. 7568, R. S. 1900), within which to take its appeal from the judgment rendered by the justice, and is not required to take the appeal within ten days after the rendition of judgment. *Donohue v. Ins. Co.*, 267.

## APPEALS—Continued.

3. ———: **Statute.** The statute (Secs. 7398 and 7399, R. S. 1909), authorizing process to be served on the Superintendent of Insurance where the defendant is a foreign insurance company licensed to do business, but having no place of business, in this State, does not render the company a resident of the county in which plaintiff resides and in which it has been sued before a justice of the peace, but only confers jurisdiction; as to the time within which it must take an appeal from a judgment rendered by the justice, it still remains a non-resident of the county. *Ib.*
4. **Affidavit and Bond: Wrong Name: Amendment.** An appeal from a judgment of a justice of the peace should not be dismissed because the affidavit and bond therefor were not, made in the name of the appellant, if before a motion to dismiss is ruled an amended transcript showing the appeal had been taken in its true name is sent up, and an amended affidavit and bond, made by permission of court and by the same affiant and surety, are filed. *Ib.*
5. **Dismissal of Case at Return Term.** Where the notice of an appeal from a judgment rendered by a justice of the peace was so defective as to constitute no notice, and appellee at the return term filed his motion to dismiss on the ground that no notice had been given, and appellant, before the motion was ruled, by permission of court filed an amended transcript and an amended affidavit and bond, and thereupon the motion was overruled, it was error to call the case for trial and, upon the appellee's refusal to plead further, to dismiss the case at said return term; for appellee's motion to dismiss was not an exercise of his option to try the case at said term, but his refusal to plead further was a protest against being forced to trial at a term at which, under the statute (Sec. 7583, R. S. 1909), the cause was triable only at his option. *Ib.*
6. **Appellate Jurisdiction: Usurpation.** Under a constitutional government the acts of a court not within its powers prescribed by the organic law are usurpations, and when done by a court of last resort may become a grave menace. *Vordick v. Vordick*, 279.
7. ———: **Divorce: Other Issues.** Divorce *per se* is not one of the cases named in the Constitution in which an appeal lies to the Supreme Court, and if it has jurisdiction to review a judgment for divorce on its merits it must be because it involves some issue which brings it within the enumeration of specific cases wherein it is given appellate jurisdiction. *Ib.*
8. ———: ———: **Alimony: Amount in Dispute: How Ascertained.** Where the trial court granted the wife a divorce and alimony in the sum of \$5,000, and the only possible ground upon which the Supreme Court has jurisdiction of her appeal is that the amount in dispute exceeds \$7,500, the fact that it has jurisdiction on that ground must affirmatively appear from the record made in the trial court; and if the petition does not allege any definite amount she is entitled to recover, either as alimony or attorney's fees, the entire record should be examined, to determine what is the amount in dispute. *Ib.*
9. ———: ———: ———: ———: **Inadequate Award: Social Station.** Where the plaintiff in her petition in the divorce case did not allege the amount she was entitled to recover as alimony or

## APPEALS—Continued.

attorney's fees and its prayer was that she be adjudged such alimony as in the nature of the case and the circumstances of the parties may be right and proper, and in her motion for a new trial she complained that the amount of alimony awarded her was inadequate and less than she was entitled to under the law and the evidence and further that she should have been adjudged an amount sufficient to yield her an income that would support her according to the station in life of herself and defendant, the amount in dispute on her appeal is the difference between the \$5,000 adjudged to her and either (a) the adequate amount to which she is entitled under the law and the evidence, or (b) an amount that would yield an income sufficient to support her according to her station in life; and unless it affirmatively appears from the entire record that the amount she was entitled to recover for one or the other of these reasons, is an amount in excess of \$12,500, the Supreme Court has no jurisdiction of her appeal—there being no other ground on which jurisdiction is invested in said court except the one possible ground that the amount in dispute exceeds \$7,500. But she could have fixed appellate jurisdiction in the Supreme Court, by claiming in her petition an amount in excess of \$7,500 over and above the amount awarded her by the trial court, unless the allegations made it apparent that such claim was fictitious and colorable only. *Vordick v. Vordick*, 279.

10. **Agreed Statement: Omissions and Ambiguities.** An agreed statement of facts upon which the case is submitted to the jury stands in lieu of a special verdict, and if it contain any ambiguity, or any fact necessary to a recovery is omitted, a judgment for defendant will on appeal be affirmed. *Byers v. Essex Inv. Co.*, 375.
11. **Demurrer: Refusal to Plead Further: Judgment: Appellate Practice.** Where defendants interposed a general demurrer to the petition, which the court sustained, and, upon plaintiff's declining to plead further, entered judgment on the demurrer, the only question for consideration upon an appeal by plaintiff is the sufficiency of the petition, and if it states a cause of action, either under the statute or at common law, the judgment will be reversed, but otherwise it will be affirmed. *Harelsan v. Tyler*, 383.
12. **Appellate Jurisdiction: Not Contested by Either Party.** Notwithstanding neither party has questioned the jurisdiction of a court, the first question to be raised and decided by any court in any case is whether it has jurisdiction in point of fact. *Bealmer v. Fire Ins. Co.*, 495.
13. ———: **Constitutional Question: Timely Raised.** If the only ground upon which the Supreme Court can have appellate jurisdiction of a case appealed to it is that the constitutionality of a certain statute is involved, the court must decide, although its jurisdiction is not questioned, whether such question was timely lodged in the case. *Ib.*
14. ———: ———: ———: **Wrong Section.** If the constitutionality of a certain section was not called in question in the trial court, that question, to be available as determining appellate jurisdiction, cannot be raised by assignment in the appellate court. If, by objections to the introduction of evidence and to the giving of certain instructions and by grounds stated in the motion for a new trial, appellant in the trial court challenged the consti-

## APPEALS—Continued.

- tutionality of Section 7047 of the Revised Statutes, it cannot on appeal shift those objections to Section 7052, and have the Supreme Court assume jurisdiction on the ground, first assigned in its brief, that said Section 7052 is unconstitutional for the reasons on which the validity of Section 7047 was challenged in the trial court. *Ib.*
15. ———: ———: **Construing Statute: Due Process.** A wrongful construction of a statute by the trial court, even though it be admitted that such construction renders the statute unconstitutional, does not deprive appellant of its property without due process of law, or deny to it the equal protection of the laws, or introduce into the case a constitutional question in such wise as to confer appellate jurisdiction on the Supreme Court. A wrongful construction does not involve the validity of the statute, but the validity of the court's construction, and a wrongful construction amounts to no more than an erroneous judicial decision. *Ib.*
  16. ———: ———: **Mere Assertion.** A mere assertion that a certain section is unconstitutional is not sufficient to confer appellate jurisdiction on the Supreme Court. It is not enough that the instruction merely state that the section is unconstitutional and void because in conflict with named sections of the Constitution, without any statement, either in the instruction or the brief, of the facts which create the conflict. *Ib.*
  17. **Laches: Action at Law: Suit to Quiet Title.** Laches is no defense to an action at law. Where the petition and answer are not set out, but abstracted by appellant, and it is stated in this abstract that laches was interposed by the answer as a defense, but both this abstract and the statement of respondent also say that the petition was an ordinary action under the statute to quiet title, and the record shows the case was tried as one at law, the case will be so treated on appeal, and the finding of the judge sitting as a jury will be binding, for such a petition states a cause of action at law, and not in equity. *Brooks v. Roberts*, 551.
  18. **Ruling on Former Appeal: Law of Case.** That a ruling on a former appeal may become the law of the case on a second appeal is applicable only when such prior ruling is determinative of some issue in the case. *State ex rel. Bush v. Sturgis*, 598.
  19. ———: ———: **New Evidence.** If on a new trial after a verdict is reversed, material evidence on the question decided is produced, the ruling on the first appeal does not become the law of the case. *Ib.*
  20. **Objections: General.** Objections to testimony must be specific, and upon an adverse ruling thereon exceptions must be saved; otherwise, they may be disregarded on appeal. *State v. Stevens*, 639.
  21. **Fair Trial: No Exceptions.** Where no objection was made to the admission of testimony that plaintiff's pretended injuries were simulated, no request was made that defendant's counsel be rebuked for their conduct or that the jury be discharged, and no exceptions were taken to the conduct of the trial in the manner complained of on appeal, it cannot be ruled that plaintiff was not afforded a fair and impartial trial. *Ulrich v. C., B. & Q.*, 697.
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## ASSIGNMENT.

1. **Sale of Properties: Liability of Vendee for Unpaid Debts: Preference.** Where one company took from another a large amount of property, far in excess of the claim of a judgment creditor of the vendor, for which the said transferee paid no consideration and to which it acquired no title, and placed it beyond the reach of such creditor, such transferee company must pay such judgment creditor. The vendor has the undoubted right to prefer one creditor to another, but it cannot transfer the exercise of the right to another company, so as to authorize the transferee to administer the vendor's assets. [Per CRAMER, Special Judge; WILLIAMSON, J., concurring, in a separate opinion in which WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Railways Co.*, 247 Mo. 1. c. 366.] *Johnson v. United Rys.*, 90.
2. ———: **Unpaid Judgments: Amount Paid by Assignee: Clean Hands.** If the amount paid by the assignee of unpaid judgments is the amount that the judgment debtor cannot pay and his transferee refuses to pay, the assignee has a justiciable claim against the transferee, and is not chargeable with coming into court with unclean hands for that he paid only one-third of their face value. [Per WILLIAMSON, J.] *Ib.*
3. ———: ———: **Directors Trustee for Creditors.** To the extent to which the assets of a corporation may be regarded as a trust fund for its creditors, the directors are trustees of those assets for such creditors; and where a corporation transfers all its tangible assets to another, the president of such corporation is a trustee for the benefit of those persons who had existing claims against the corporation. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.] *Ib.*
4. ———: ———: ———: **Notice.** Where two corporations, at the time one of them transferred all its tangible assets to the other, had the same executive officers, the same claims department, the same counsel, and, with the exception of one member of each board, the same individuals upon the board of directors of each, the transferee company was chargeable with notice of the existence of judgments and suits for judgments against the other company, whether or not the transferee company, in the assignment instruments, assumed to pay such claims. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.] *Ib.*
5. ———: ———: **Assets in Excess of Consideration.** Where one corporation, in consideration of the release of a lease under which another was operating a system of street railways, took over all its tangible assets, assuming to pay its bonded and other contract debts, but not existing judgments for personal injuries, and thereby received property far in excess of the amount of the debts assumed, without paying any consideration for such excess and without the consent of such judgment creditors, leaving their judgments unsatisfied, and took the property under such circumstances as to amount to actual notice of such outstanding claims, the transferee company is legally bound to pay such claims, since the assets of the transferring company constituted a trust fund for the payments of its debts, and a transfer of assets, without consideration, is void as to creditors of the transferor, though

## ASSIGNMENT—Continued.

it assumed legal form. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Rys. Co.*, 247 Mo. 1. c. 366.] *Ib.*

6. ———: **Sale or Release: Substantive Wrong: Equity.** It matters not by what name the transaction by which one corporation transferred all its assets to another is characterized whether as a sale or assignment or the release of an existing lease, if its effect was to turn over, without consideration, a trust fund held by the one to pay its debts, to the other, and such transferee took the assets, knowing that they far exceeded the debts assumed, and with notice of the unpaid debts of the other, equity will hold the transfer void as to the existing creditors. Equity looks to substance and not form, and will not sanction an unconscionable result merely because it has been brought about by means which simulate legality. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.] *Ib.*
7. **Conditional Sale: Right of Heirs to Repurchase.** Some authorities holding an option to purchase property creates no interest that is either assignable or transmissible to heirs of the option-holder, are cited in the opinion, but the point is not ruled, because it is unnecessary to a proper adjudication of the issues. *Carson v. Lee*, 166.
8. **Cause of Action: Stipulation as to Settlement: Substitution.** An action in ejectment pending in the proper court, with a stipulation on file between all the parties agreeing to a final disposition of the case, is assignable, and a conveyance by quit-claim deed, executed by plaintiffs, in which they convey to a named grantee all their right, title and interest in the land and to the damages for rents and profits, is such an assignment, and entitles the grantee to be substituted as plaintiff, unless the cause of action had already been lost for some other reason. *Norton v. Reed*, 482.
9. **Dismissal.** Where a cause of action is pending on a stipulation for judgment and is assigned by the plaintiffs, together with all their interests in the property in suit, the court should not permit plaintiffs, upon the payment of costs, to dismiss the action, without the consent of the assignee. *Ib.*

ASSOCIATION OF TRADERS. See **Trusts and Combinations.**

## ATTACHMENT.

1. **Suit in Another State: Notice by Publication: Main, and Ancillary Issues: Jurisdiction.** A Tennessee grain dealer deposited money in a Missouri bank to guarantee a Missouri farmer that his drafts for corn shipped to the grain dealer would be paid. The farmer shipped a carload of corn and took the bill of lading to the bank, and was for the first time informed that the grain dealer had drawn out the guaranty fund. Expressing dissatisfaction, he drew his draft on the grain dealer, which was dishonored by the drawee and returned to the bank. The farmer threatened to sue the bank for surrendering his security without notice, and to settle the matter the bank purchased the corn, placing the amount of the draft to the farmer's credit, receiving its title by an assignment

## ATTACHMENT—Continued.

of the bill of lading, and sent it to a Tennessee factor, who sold the corn for the bank, receiving the money therefor. The grain dealer, claiming that he had sustained damages in a large sum on account of the poor quality of four previous carloads of corn purchased from the farmer, brought suit in Tennessee, by garnishment, against the farmer, the bank and the factor, giving notice to the farmer and bank by publication. The bank entered its general appearance, and the factor paid the money into court, to be disposed of according to its decree. Notwithstanding the farmer made no appearance, the court found he was indebted to the grain dealer in a large sum, and adjudged that the grain dealer was entitled to the fund deposited in court by the factor. Thereupon the farmer sued the bank in a Missouri court for the amount of the draft deposited to his credit when the bill of lading was assigned to the bank. *Held*, that the judgment of the Tennessee court impounding the fund was only ancillary to the principal issue, whether the farmer was indebted to the grain dealer, and as he had no property in Tennessee the validity of that judgment depends upon whether the Tennessee court acquired jurisdiction to render a judgment against him on the principal issue. *Palmer v. Bank*, 72.

2. **Suit In Another State: Appearance: Waiver: Constitutional Question.** Since the defendant bank appeared generally in the Tennessee court, did not object to the jurisdiction of the court over the principal defendant in the attachment proceeding, did not assert the unconstitutionality of the Tennessee statute which authorized constructive service upon both, and, without any appearance whatever by the non-resident principal defendant, went to trial on the merits of the case, and was defeated, it will not now be permitted to deny the validity of the Tennessee judgment awarding a fund belonging to it to the plaintiff in that case as a creditor of the principal defendant therein; but in a suit by said principal defendant against said bank, in a Missouri court, to recover money placed to his credit in the bank, the question whether the adjudication by the Tennessee court that the plaintiff was indebted to the plaintiff in that attachment suit is binding upon the plaintiff in this, or was void for lack of jurisdiction, is for determination. *Ib*.
3. ———: **Jurisdiction.** No judgment of a state court can have any validity unless supported by a personal notice to the defendant, served within the state, or by his voluntary appearance and submission to the jurisdiction, except in so far as it may be directed against property actually in the state and therefore subject to its jurisdiction. *Ib*.
4. ———: ———: **In Rem.** If the plaintiff at the time the garnishment judgment rendered against him and the defendant bank by the court of Tennessee had never been within that state, did not enter his appearance, and the money, of which it is claimed the Tennessee court acquired jurisdiction *in rem*, was deposited in the defendant bank in Missouri, payable to plaintiff upon demand, he was not bound by the judgment of the Tennessee court impounding the money for the use of his Tennessee creditor; for that court, neither by statute nor otherwise, could acquire jurisdiction over him or the *res*. *Ib*.

ATTRACTIVE NUISANCE. See Nuisance.

## AUTOMOBILE.

1. **Negligence: Injury to Traveler: Stopping Car: Knowledge of Peril.** Where there is substantial evidence that the automobile truck could have been stopped within a few feet, that the night was clear and the driver could have seen plaintiff skating on the roadway at the intersection of two traveled streets, three blocks away, and that the driver neither slackened his speed nor signaled his approach, whether he could have reduced his speed and stopped before he reached plaintiff, and whether he knew, or by carefully watching would have known, plaintiff was in peril from the truck if he proceeded farther, were questions for the jury to determine. *Ballman v. Teaming Co.*, 342.
2. ———: ———: ———: **Contributory Negligence.** Even though the inference from the evidence that the negligence of the little boy skating in the roadway at the intersection of two traveled streets contributed to his injury is unavoidable, if the evidence leaves the jury free to find that the driver of the automobile truck had a fair chance to avoid running over the boy, after his danger became apparent to the driver, or would have done so had he kept a proper lookout, the case is for the jury. *Ib.*
3. ———: ———: ———: ———: **Verdict Notwithstanding: Children Playing on Street.** Testimony by the little boy that he looked west when at the north line of the east-and-west street and saw no vehicle coming and the fact that he was struck, by an automobile traveling eastward, at the end of the arc around which he skated in turning back northward in the north-and-south cross street, and testimony of a companion, five or six feet behind him, that as he entered the east-and-west street he saw the automobile a half block away, have a tendency to prove that the automobile was on the left side of the street, and that the driver had ample time to signal, to veer his machine to the south so as to miss the boy, or to stop, and is sufficient to authorize a verdict for plaintiff notwithstanding the boy's movements and neglect to watch out for his safety as participating causes of his injury. Admitting that if his companion saw the automobile the ten-year-old boy could also have seen it, the immaturity of the boy, the habits of boys to play on the streets, the thoughtlessness of children as compared to men, and the failure of the driver to signal, must also be considered, and it was proper to submit the issue of negligence of the driver in ways alleged in the petition other than in not doing what he could to avoid the collision, after he knew, or could have known, it was impending. *Ib.*
4. **Driver's Degree of Care: Contributory Negligence.** A driver of an automobile on a public highway is required to use "the highest degree of care that a very careful person would use under like or similar circumstances," and the statute establishes a general rule for all drivers, not only to protect the lives and property of others, but also to protect themselves and others traveling with them from injury by collision with obstructions in the road, whether legally or unlawfully placed there. Any less degree of care by the driver is contributory negligence, and bars a recovery by him for personal injury from the telephone company which had placed the obstruction in the road. *Jackson v. Tel. Co.*, 358.
5. **Care Defined.** Ordinary care is such care as would ordinarily be exercised by an ordinarily careful person under the same or similar circumstances. But the statute requires the driver of an



**AUTOMOBILE—Continued.**

automobile on a public highway to exercise "the highest degree" of care that a "very careful person" would use under like or similar circumstances; and those words mean the highest care and caution of an experienced and competent chauffeur, since an automobile is an exceedingly dangerous machine unless kept under control. They do not mean the highest conceivable degree of prudence and skill possible to man, but the highest degree that has been demonstrated to be practicable. *Jackson v. Tel. Co.*, 358.

6. **Contributory Negligence: Question for Jury.** Under the Automobile Statute of 1911, if reasonable men may honestly differ as to whether the driver of the automobile, the circumstances considered, exercised the highest degree of care of a very careful person, the question of his contributory negligence is for the jury to settle; but if his failure to exercise such care is apparent to all reasonable men from the undisputed facts in evidence, then it becomes the duty of the court to declare, as a matter of law, that his contributory negligence bars a recovery; and in this case it is held that plaintiff's own undisputed testimony unquestionably shows that he was not exercising the highest degree of care of a very careful person, and therefore a demurrer should have been sustained. *Ib.*
7. **To Right of Center of Road.** The statute (Par. 9, sec. 8, Laws 1911, p. 327) requires the driver of an automobile to turn to the right of the center in approaching a turn in the public highway only when he meets another person riding or driving a horse or another motor vehicle; if there is no other person or vehicle on the road, he has the right to use the center, and even the left side. *Ib.*
8. **Skidding: Knowledge of Driver.** Where the driver of the automobile left the smooth and beaten center of the public road, when there was no necessity for doing so, and encountered clods which caused his car to skid and strike a guy telephone pole, his contributory negligence cannot be excused by a failure of the evidence to show that he did not know that automobiles would skid in turning on to rough ground and clods. A very careful person, exercising the highest degree of care, venturing to drive an automobile at a turn in the public highway, at a speed of twelve or fifteen miles an hour and with the power off, thirty or forty feet over dry clods and rough ground, in daylight, his view unobstructed, would, before doing so, at least inform himself as to the common conditions and places in the roads which cause such vehicles to skid. *Ib.*

**BONDS.**

**Appeal: Affidavit and Bond: Wrong Name: Amendment.** An appeal from a judgment of a justice of the peace should not be dismissed because the affidavit and bond therefor were not made in the name of the appellant, if before a motion to dismiss is ruled an amended transcript showing the appeal had been taken in its true name is sent up, and an amended affidavit and bond, made by permission of court and by the same affiant and surety, are filed. *Donohue v. Ins. Co.*, 267.

**BOOKS OF ACCOUNT.** See **Account.**

**CERTIORARI.** See **Conflict of Opinions.**

## CHARITIES.

1. **Trust Fund: Failure of Objects: Cy Pres Doctrine.** Whether or not there has been a failure or a partial failure of the definite charitable objects for which a trust fund was created is a question of fact to be determined by evidence; and unless the evidence shows with reasonable certainty that there will be a permanent failure of at least a substantial portion of the objects of the trust, the question of further administration and disposition of the fund does not arise, nor can questions of what might be done with the fund were there a failure of the charitable objects be considered. *St. Louis v. McAllister*, 26.
2. ———: **Reinvestment.** The power of a court of equity to authorize the alienation of property belonging to a charitable trust should be exercised with caution, and should not be exercised at all unless it clearly appears that the proposed alienation would be for the benefit of the charity. So that where the trust fund consists of many tracts of real estate, and the estimates of the price at which it could be sold are one-half its value, and there is no evidence that if sold and the proceeds invested in Government or State bonds the income would amount to as large a net return as is now realized, a decree ordering all the real estate sold and the proceeds invested in bonds should not be rendered. *Ib.*
3. **Shown by Articles: Parol Evidence.** An association whose purposes are to nurse the sick and establish and support a home where deaconesses are to be educated and trained to serve as nurses for sick and aged persons admitted to the home, whose members are required to believe in the creed of the Apostles and are to pay annual dues and receive no dividends or compensation, and whose directors have no power to distribute funds to its members as profits or otherwise, but only to use them to carry out its charitable and benevolent objects, is a charitable association. And all these facts appearing from its articles of association, parol evidence to show its charitable character is not necessary, but evidence to the effect that its funds, whether received from dues or donations or derived from pay patients, were held in trust for the charitable and benevolent purposes of the organization, does not destroy or alter its character as a charity. *Nicholas v. Deaconess Home*, 182.
4. **Personal Injury to Patient: Recovery of Damages.** A charitable association is not liable in damages for personal injuries to its patients caused by the negligence of its trustees, servants or employees. The funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted or absorbed by claims arising from the negligence of the trustees or employees. *Ib.*
5. ———: ———: **Pay Patient.** The fact that the patient at the hospital for the charitable association was not a charity patient, but paid for all the services rendered by the nurses and for the medicines and supplies furnished by the association, does not entitle her to recover damages for injuries caused by the negligent application by a nurse of carbolic acid, instead of alcohol, to her skin, during the course of a message prescribed by her physician. *Ib.*
6. **Common Law: Pleading: Gift: Private Charity.** In a suit to construe a will, devising property in Kansas and probated in that

**CHARITIES—Continued.**

State, the will was alleged to be invalid for that it attempted to create a private charity, in violation of the common law in force in that State, and the petition, after a general averment "that the common law in force in Kansas is and was in part at all times mentioned as follows," proceeded, in several paragraphs, in some of them arbitrarily and in others argumentatively, to state what is alleged to be the law of Kansas relating to wills and charities and the powers and duties of the donee (a school district) in reference thereto, but alleging nothing either affirmative, definite or precise as to what is the actual common law of the State. *Held*, that it is essential that the common law of Kansas itself, as found in the court decisions of the State, be pleaded as any other fact, and the petition is not good as against a general demurrer. *Musser v. Musser*, 649.

7. **Common Law: Pleading: Ultimate Facts.** A petition, in stating the ultimate facts in regard to the common law of another state, relied on as the basis of the action, and not the law itself, is not sufficient. Ultimate facts are nothing more than issuable, constitutive or traversable facts essential to the statement of a cause of action, and are not mere conclusions as to what the facts are. *Ib.*
8. ———: **Demurrer: Admissions.** A general demurrer to a petition does not admit conclusions of law. Where the petition simply contains general averments as to what the common law of another state is, but does not plead that law itself as facts, a demurrer to it that it does not state facts sufficient to constitute a cause of action does not admit the common law of the State to be what the averments allege it to be. *Ib.*
9. ———: **Private Charity: Gift for Educational Purposes.** The Supreme Court of Kansas has never decided that every public charity must be such as the State may lawfully maintain by public taxation. Therefore, an allegation in the petition to construe a will by which property was bequeathed "for the purpose of creating an endowment for the education of worthy young men and women of a school district" in a named county, "preference to be given to those who are orphaned," that the will attempted to create a private charity, and that the gift was void because the object was not one which "the State itself ought and lawfully might endow and support with public resources," does not and cannot state a cause of action, because there are no decisions of that State so holding. *Ib.*

**CHIROPRACTIC.** See **Employment.**

**CITIES.**

1. **Sewer District: Lot: Definition.** Section 14 of Article 6 of the Charter of St. Louis relates, not to sewer districts, but to the construction of streets, boulevards and alleys, and the word "lot" used therein is required to be construed "as used in this section," and is not to be understood as a definition of "the lots of ground" and "the lots and parcels of ground" used respectively in Sections 21 and 22, which relate to district sewer and joint sewer districts, according to which assessments of benefits are made by area, and not by front-footage, and wherein the words "lot" and "parcels of ground" are used as equivalent terms. *State ex rel. Boatmen's Bank v. Reynolds*, 1.

## CITIES—Continued.

2. ———: **Tax Bills: Against Lots Instead of Whole Tract: Dedication of Streets.** Where the recorded plat divided a tract into seven lots, designating streets and alleys thereon, separate tax bills to pay the costs of constructing a district sewer may, under the charter of St. Louis, be issued against the lots severally, and are not void because one tax bill was not issued against the tract as a whole, although the streets and alleys have not been actually established; nor is there anything in Bambrick Bros. Construction Co. v. Semple Place Realty Co., 270 Mo. 450, that requires the assessment to be made by one tax bill against the entire tract. Nor was it necessary that there should have been a dedication of the streets and alleys to public use, according to the recorded plat, in order to give validity to the tax-bills. *Ib.*
3. ———: ———: **Substantial Compliance With Charter Provisions.** If charter provisions concerning the assessment of benefits for a public improvement have been substantially complied with and the improvement has been made according to contract, irregularities which do not injuriously affect the interests of the property-owner should not be permitted to defeat a suit on the tax-bills; and where such is the case, a ruling by the Court of Appeals that such irregularities render the tax-bills void and in the same opinion denouncing the ruling as unjust, is in conflict with *Sheehan v. Owen*, 82 Mo. 458. *Ib.*
4. ———: ———: **Directory Provisions.** A charter provision concerning a district sewer which requires the issuance of "a special tax-bill against each lot in the district" should be held, in the absence of a showing of some loss or damage to the property owner, to be directory only; and where the sewer has been constructed in substantial compliance with charter provisions and the contract, a holding that such a requirement is mandatory and the tax-bills void because the entire assessment was not included in one tax-bill against the entire tract, is to confiscate the labor and material which went into its construction, and is in conflict with *Granite Bituminous Paving Co. v. McManus*, 244 Mo. 184. *Ib.*
5. **Power of City: Use of Streets.** The charter powers of the City of St. Louis to establish, locate, dedicate and supervise the highways of the city, and "to do all things whatsoever expedient for promoting the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufacture of the city or its inhabitants," having their origin in the police powers of the State, are ample to authorize the city by legislative enactment, not only to establish and improve its streets, but to prescribe the terms and conditions upon which they may be used, subject only to the Constitution and laws of the State. *Ex parte Lerner*, 18.
6. ———: ———: **Validity of Ordinance: Test Rule.** The validity of an ordinance enacted by the City of St. Louis in pursuance to its charter powers is to be tested by the rules of interpretation applicable to state legislative enactments. *Ib.*
7. ———: ———: **Violation of Ordinance: Civil or Criminal Proceeding.** While a prosecution for a violation of a city ordinance regulating the use of streets is technically a civil proceeding, yet in so far as it authorizes the imposition of a penalty upon conviction it partakes of the nature of a criminal action, and the validity of the ordinance is subject to the same rules of construction as is a criminal statute. *Ib.*

## CITIES—Continued.

8. **Power of City: Use of Streets: Validity of Ordinance: Special Classes.** An ordinance regulating the use of streets, to be valid, must be general in its terms and uniform in its application to the class of persons or subjects to be affected. If it seeks to regulate citizens in the otherwise lawful use of their property or the conduct of their business, the rules and conditions by it required to be observed must be so specified that all citizens may alike be required to comply with them. *Ex parte Lerner*, 18.
9. ———: ———: ———: ———: **Soliciting Business.** An ordinance which seeks to punish any person who shall accost another on a street in front of any store and solicit such person to purchase, at another store, goods, wares or merchandise of like nature as those kept in such store, is invalid, since it does not apply to all persons or streets alike, but is special in its terms and local in its application, and contravenes the constitutional provision that "where a general law can be made applicable, no local or special law shall be enacted." *Ib.*
10. ———: ———: **Police Power: Public Welfare: Subject to Constitutional Inhibition.** A city cannot enact a police regulation which contravenes either the Constitution or a statute enacted by the Legislature. An ordinance enacted in the exercise of the police power must be general in its nature and applicable alike to all persons who may properly come within its purview. It is not sufficient that its enforcement would promote the general welfare, for instance, that it would facilitate the public use of streets; but, to avoid constitutional inhibition, it must be general in its terms and uniform in its application. *Ib.*
11. **Street Railway Spurs: Discontinuance.** The Public Service Commission has the power to authorize an interurban railway company, permitted by ordinance to lay its tracks in the streets of a city, to discontinue the use of spur tracks connecting the interurban system with railroad stations in said city, no longer essential to the operation of the interurban lines and operated at substantial loss.  
*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that the Commission has no power to relieve a street railway company from its contractual obligation, imposed by its franchise ordinance, to maintain its tracks in designated streets for a designated period. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.
12. ———: ———: **Restriction on City's Power: Constitutional Provision.** That provision of the Constitution (Section 20 of Article 12) which forbids the General Assembly to grant the right to construct and operate a street railway within a city "without first acquiring the consent of the local authorities having control of the street" does not confer on the city power, either by ordinance or contract, to impose upon a public utility conditions of operation and maintenance which would confiscate its property or destroy its power to serve the public. This constitutional provision does not mean that a street railway, once properly admitted into the city, cannot be permitted by the State to take up an unprofitable portion of its tracks.  
*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the franchise contract imposes on the street railway company the obligation to operate the tracks,

## CITIES—Continued.

the State, without the city's consent, cannot, under said constitutional provision, grant permission to abandon the tracks, since the city has the right to impose the condition, and the operation of the tracks is not an exercise of a police regulation, such as is the increase or decrease of fares. *Ib.*

13. ———: ———: **Denial for Lack of Jurisdiction: Questions for Review.** When the Public Service Commission has dismissed the application of an interurban railway to discontinue the operation of certain spur tracks laid in the streets of a city, on the sole ground that it is without power to grant the relief, the question whether the franchise ordinance contains express provisions denying the company the right to take up a part of its tracks when the consent of the State is procured, and the question whether the ordinance in itself by its terms and conditions permits the company to remove unprofitable portions of its tracks, cannot be considered in an appeal from an order of the Commission refusing to consider the case on the ground that it had no jurisdiction. These are questions of fact and for determination by the Commission, and the power of the court is simply one of review, after jurisdiction has been assumed. *Ib.*
14. ———: ———: **Consent of City: Abandonment of Track.** It cannot be ruled that if the street railway company is permitted to remove its tracks from a part of the streets which the city consented it might occupy with its tracks, the consent of the city to the company to enter was not given at all. *Ib.*
15. ———: ———: **Abandonment at Will.** A street railway company which has obtained the city's consent to occupy certain streets with its tracks cannot abandon any of them at its will. In no event can it abandon a street except upon a showing that the public will not be injured. *Ib.*
16. ———: ———: **Regulating Use.** The power of the city to regulate the use of streets which the city has consented a street railway company may occupy is to be ascertained by the contractual relation. The public service character of the company subjects it to regulation, but that fact does not determine whether the regulatory power extends to a particular thing. *Ib.*
17. ———: ———: **Permission to Occupy: Obligation.** A mere permission granted by the franchise ordinance to a railway company to occupy streets for forty-nine years is not a contract to operate for that period, nor can such an obligation be implied from the permission.  
*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the city has consented that a railway company may construct its lines in the streets upon condition that it operate them for 49 years, the condition is valid, does not transgress the police powers of the State, and can be abrogated only by consent of the city itself. *Ib.*
18. ———: **Conditions Imposed by Franchise.** The constitutional provision (Section 20 of Article 12) merely secured from legislative interference the right of a city to deny entrance to a street railway, and the right to impose conditions is implied, but is not unlimited, for the conditions must be within the scope of municipal authority. The city cannot, in the exercise of its power to con-

## CITIES—Continued.

dition its consent, whether by franchise contract or otherwise, curtail the police power vested in the Legislature, nor draw under its dominion subject-matter not otherwise within its jurisdiction, *Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that a condition expressed in the franchise contract that a street railway shall operate its lines for a period of 49 years as the price of the city's consent to construct its tracks in designated streets is valid, does not contravene the police powers of the State, and therefore the Public Service Commission cannot grant to the company, without the city's consent, permission to abandon certain spur tracks, on the ground that their further operation is unprofitable and wasteful. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.

19. ———: ———: **Estoppel.** The question of estoppel in favor of a city, in consideration of conditions imposed upon a street railway company at the time a franchise ordinance to occupy the streets was enacted, does not arise in a case in which the public, represented by the Public Service Commission, is a substantial party. *Ib.*
20. **Measure of Damages: Viaduct: Obstruction of Access.** Where a part of the street, two feet wide, between the seven-foot viaduct and plaintiff's property, had not been elevated but remained as it was before the viaduct was constructed in the street, there is no room in the case for an instruction telling the jury that one measure of plaintiff's damage is the amount of money it would cost to raise the surface of plaintiff's property to a level with the present surface of the viaduct. *Witler v. St. Louis*, 457.
21. ———: ———: ———: **Special Benefits.** Where access to plaintiff's property has been completely prevented on the east by the erection of a seven-foot viaduct in the north-and-south adjoining street, and has otherwise been shut off by a ninety-nine-year lease of the property on the south, north and west to a railroad company and the inclosure thereof by a fence, there can be no special benefits to their property by the construction of the viaduct, and the court is not authorized to instruct the jury to take special benefits into consideration as a set off to the damages sustained by them. *Ib.*
22. ———. **Interest: Torts: Instruction: Mutual Error.** Where the instructions asked and given for both plaintiff and defendant told the jury to assess the damages, together "with interest on such sum at the rate of six per cent per annum from such date as from the evidence the jury find said obstruction of access" to plaintiffs' property by the construction of a seven-foot viaduct in the adjoining street "was complete," defendant cannot complain that the court instructed the jury to allow interest, even though it be admitted that interest is not allowed in actions *ex delicto*. *Ib.*
23. **Damages: Excessive: Contradictory Testimony: Question for Jury.** Where the testimony in regard to the value of plaintiffs' property, and the damages thereto caused by the construction of a seven-foot viaduct in the adjoining public street and the complete obstruction of their access thereto, is exceedingly contradictory, but sufficiently substantial, if believed, to support the verdict, and there is nothing in the record to indicate passion or prejudice on the part of the jury, it is the peculiar province of the jury to as-

## CITIES—Continued.

certain and determine the amount of damage, and the court will not interfere with their finding. *Ib.*

24. **Attractive Nuisance:: Wall About Park.** A wall about a city park, twenty feet in height in places, but its height depending on the topography of the ground, topped with a coping thirty inches wide, is not an attractive nuisance, within the doctrine of the turntable cases, to a child, an invitee of the city, who, in play, enters upon the wall at a low place, and falls from it at its highest place, and the Court of Appeals, in approving an instruction which submitted to the jury that theory of negligence, contravened *Kelly v. Benas*, 217 Mo. 1. c. 13; *O'Hara v. Gas Light Co.*, 244 Mo. 1. c. 404, and *Buddy v. Union Terminal Ry. Co.*, 276 Mo. 276. *State ex rel. Kansas City v. Ellison*, 667.

CIVIL CONSPIRACY. See **Trusts and Combinations.**

COMBINATIONS. See **Trusts and Combinations.**

## COMMON LAW.

1. **Pleading: Effect.** The effect of the statute of Kansas which provides that "the common law as modified by the constitutional and statutory law, judicial decisions, and the conditions and wants of the people shall remain in force in aid of the general statutes of this State" extends no further than to assert the common law to be there in force as therein stated, and to render unnecessary any presumption that might otherwise obtain an account of that State not having been carved out of the original territory subject to the law of England. Considered in any other sense, the pleading of the statute is a mere conclusion. *Musser v. Musser*, 649.
2. **Definition: How Pleased.** The common law is not "a true body of law" in the sense that it is collected into a code or any particular book; but it began in statements and principles announced in decisions of courts, which have been multiplied and modified by subsequent decisions, until they are regarded as accumulated and approved expressions of what is right and just. In this country, the common law is inseparably identified with judicial decisions, and what is the common law of any particular state is to be ascertained by an examination of its decisions, as precedents; and where an attempt is made to plead the common law of another state, the rules of decision of the courts of that State, as applicable to the particular case, are the things to be alleged, as the basis of the action. It is not sufficient to plead what counsel may think is the common law of the foreign state, but it, as well as its violations, must be pleaded with distinctiveness, as any other substantive fact. *Ib.*
3. **Pleading: Conclusions.** In pleading the decisions of another state from which the common law therein is to be determined, pertinent parts of such decisions should be alleged, in order to avoid the charge of stating mere conclusions. If the common law of such foreign state is the basis of recovery or the constitutive fact of plaintiff's case, mere conclusions as to what counsel may think the decisions of its courts may mean will not suffice. *Ib.*



CONFLICT in LAWS. See Laws, 2.

CONFLICT OF OPINION.

1. **Certiorari to Court of Appeals: Unjust Decision.** Upon *certiorari* directed to a Court of Appeals based on an allegation of a conflict of its opinion in a given case with prior decisions of the Supreme Court, the Supreme Court cannot interpose merely because it may regard the decision of the Court of Appeals as unjust. The sole inquiry is: Is the opinion in conflict with controlling decisions of the Supreme Court? If it is, the record must be quashed; if it is not, the writ must be quashed. *State ex rel. Boatmen's Bank v. Reynolds*, 1.
2. **Sewer District: Tax Bills: Against Lots Instead of Whole Tract: Dedication of Streets.** Where the recorded plat divided a tract into seven lots, designating streets and alleys thereon, separate tax bills to pay the costs of constructing a district sewer may, under the charter of St. Louis, be issued against the lots severally, and are not void because one tax bill was not issued against the tract as a whole, although the streets and alleys have not been actually established; nor is there anything in *Bambrick Bros. Construction Co. v. Semple Place Realty Co.*, 270 Mo. 450, that requires the assessment to be made by one tax bill against the entire tract. Nor was it necessary that there should have been a dedication of the streets and alleys to public use, according to the recorded plat, in order to give validity to the tax-bills. *Ib.*
3. ———: **Substantial Compliance With Charter Provisions.** If charter provisions concerning the assessment of benefits for a public improvement have been substantially complied with and the improvement has been made according to contract, irregularities which do not injuriously affect the interest of the property-owner should not be permitted to defeat a suit on the tax-bills; and where such is the case, a ruling by the Court of Appeals that such irregularities render the tax-bills void and in the same opinion denouncing the ruling as unjust, is in conflict with *Sheehan v. Owen*, 82 Mo. 458. *Ib.*
4. ———: **Directory Provisions.** A charter provision concerning a district sewer which requires the issuance of "a special taxbill against each lot in the district" should be held, in the absence of a showing of some loss or damage to the property owner, to be directory only; and where the sewer has been constructed in substantial compliance with charter provisions and the contract, a holding that such a requirement is mandatory and the tax-bills void because the entire assessment was not included in one taxbill against the entire tract, is to confiscate the labor and material which went into its construction, and is in conflict with *Granite Bituminous Paving Co. v. McManus*, 244 Mo. 184. *Ib.*
5. **Certiorari: Extent of Review.** The Supreme Court, on *certiorari*, based on an allegation that the decision of the Court of Appeals contravenes certain decisions of the Supreme Court, is limited in its review to the opinion of the Court of Appeals. If it does not disclose a conflict with the former rulings of the Supreme Court, the power of superintendence is at an end. *State ex rel. Bush v. Sturgis*, 598.
6. **Variance Between Theory of Trial and On Appeal.** A variance between the theory upon which the case was tried and

## CONFLICT OF OPINION—Continued.

the theory upon which the judgment was affirmed in the Court of Appeals, to be available in quashing its decision, must be of such a character as to constitute an essential factor in determining defendant's liability. The difference in the two theories must involve a matter essential to the rendition of the judgment affirmed. *Ib.*

7. ———: **Immaterial Variance.** The petition alleged that defendant's negligence consisted in its failure "to give the statutory signal, by bell or whistle, as the train approached and passed over the public crossing." The answer charged that "deceased went upon the railroad track in front of a running train, heedlessly and without looking or listening." The reply was that "the night was very dark, the engine without a headlight and pushing a car in front, and no signal whatever was given." The petition charged and the jury found that deceased reached the crossing by traveling a public highway. The Court of Appeals held that "if defendant's liability is to rest on the finding that the deceased approached the crossing along the public road" the verdict cannot stand, but also held that plaintiff's right to recover was not dependent on the manner in which he approached the crossing, but that the cause of his death was the manner in which the train approached the crossing, it being its duty, since he was actually on the public crossing when struck, to give him some effective warning, and its failure to do so was negligence. *Held*, that the variance was immaterial, and the decision of the Court of Appeals is not in conflict with previous decisions of the Supreme Court. *Ib.*
8. **Trespasser.** The rule that crossing signals are for the benefit of travelers on public highways and not for trespassers has no application where deceased was not a trespasser, but actually on the public street at the time the train struck him. *Ib.*
9. ———: **Ruling on Former Appeal: Law of Case.** That a ruling on a former appeal may become the law of the case on a second appeal is applicable only when such prior ruling is determinative of some issue in the case. *Ib.*
10. ———: ———: ———: **New Evidence.** If on a new trial after a verdict is reversed, material evidence on the question decided is produced, the ruling on the first appeal does not become the law of the case. *Ib.*
11. **Recovery on Reply.** Decisions of the Supreme Court to the effect that plaintiff must recover, if at all, on a cause of action stated in the petition, and not on one stated in the reply, have no application to a decision of the Court of Appeals which rules, and properly so under the facts, that plaintiff's right to recover was limited to the cause of action stated in the petition. *Ib.*
12. **Reference to Pleadings and Instructions: Part of Record for Review.** Reference to the pleadings and instructions in the opinion of a Court of Appeals, though it neither outlines the petition or answer nor sets out the substance of the instructions with clarity, is sufficient to make both the pleadings and instructions a part of the opinion for purposes of review upon *certiorari*. Reference to a written instrument by the

## CONFLICT OF OPINION—Continued.

III.

opinion of the Court of Appeals makes such instrument as much a part of the opinion as if fully set forth therein.

*Held*, by WALKER, C. J., dissenting, with whom WILLIAMS, J., concurs, that the purpose of the constitutional provisions authorizing the Supreme Court, upon *certiorari*, to review an opinion by the Court of Appeals, was to prevent a conflict between the decisions of the two courts, and cannot be extended beyond that purpose without impairing their constitutional jurisdiction to render final decisions in cases over which they are given appellate jurisdiction; that the review should be restricted to the conflict manifested by the opinion itself; that the Supreme Court's restriction upon its power of review, to pleadings, instructions and documents referred to in the opinion, is purely arbitrary, and can by a like arbitrary ruling be extended to a review of the whole transcript of the testimony and other evidentiary facts. *State ex rel. Kansas City v. Ellison*, 667.

13. **Attractive Nuisance: Wall About Park.** A wall about a city park, twenty feet in height in places, but its height depending on the topography of the ground, topped with a coping thirty inches wide, is not an attractive nuisance, within the doctrine of the turntable cases, to a child, an invitee of the city, who, in play, enters upon the wall at a low place, and falls from it at its highest place, and the Court of Appeals, in approving an instruction which submitted to the jury that theory of negligence, contravened *Kelly v. Benas*, 217 Mo. l. c. 13; *O'Hara v. Gas Light Co.*, 244 Mo. l. c. 404, and *Buddy v. Union Terminal Ry. Co.*, 276 Mo. 276. *Ib.*

CONSPIRACY, CIVIL. See **Trusts and Combinations.**

## CONSTITUTIONAL LAW.

1. **Habeas Corpus: Constitutionality of Law.** If a person is deprived of his liberty for any act not in contravention of an existing law, or if the act or ordinance under which he is held is unconstitutional, whether the offense denounced by it is classified as a misdemeanor or a felony, *habeas corpus* is available to restore him to his freedom. *Ex parte Lerner*, 18.
2. **Validity of Ordinance: Special Classes.** An ordinance regulating the use of streets, to be valid, must be general in its terms and uniform in its application to the class of persons or subjects to be affected. If it seeks to regulate citizens in the otherwise lawful use of their property or the conduct of their business, the rules and conditions by it required to be observed must be so specified that all citizens may alike be required to comply with them. *Ib.*
3. ———: ———: **Soliciting Business.** An ordinance which seeks to punish any person who shall accost another on a street in front of any store and solicit such person to purchase, at another store, goods, wares or merchandise of like nature as those kept in such store, is invalid, since it does not apply to all persons or streets alike, but is special in its terms and local in its application, and contravenes the constitutional provision that "where a general law can be made applicable, no local or special law shall be enacted." *Ib.*

## CONSTITUTIONAL LAW—Continued.

**4. Police Power: Public Welfare: Subject to Constitutional Inhibition.**

A city cannot enact a police regulation which contravenes either the Constitution or a statute enacted by the Legislature. An ordinance enacted in the exercise of the police power must be general in its nature and applicable alike to all persons who may properly come within its purview. It is not sufficient that its enforcement would promote the general welfare, for instance, that it would facilitate the public use of streets; but, to avoid constitutional inhibition, it must be general in its terms and uniform in its application. *Ib.*

**5. Street Railway Spurs: Discontinuance: Restriction on City's Power.**

That provision of the Constitution (Section 20 of Article 12) which forbids the General Assembly to grant the right to construct and operate a street railway within a city "without first acquiring the consent of the local authorities having control of the street" does not confer on the city power, either by ordinance or contract, to impose upon a public utility conditions of operation and maintenance which would confiscate its property or destroy its power to serve the public. This constitutional provision does not mean that a street railway, once properly admitted into the city, cannot be permitted by the State to take up an unprofitable portion of its tracks.

*Held*, by GRAVES, J., dissenting, with whom WALKER C. J., concurs, that where the franchise contract imposes on the street railway company the obligation to operate the tracks, the State, without the city's consent, cannot, under said constitutional provision, grant permission to abandon the tracks, since the city has the right to impose the condition, and the operation of the tracks is not an exercise of a police regulation, such as is the increase or decrease of fares. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.

**6. ———: Conditions Imposed by Franchise.** The constitutional provision (Section 20 of Article 12) merely secured from legislative interference the right of a city to deny entrance to a street railway, and the right to impose conditions is implied, but is not unlimited, for the conditions must be within the scope of municipal authority. The city cannot, in the exercise of its power to condition its consent, whether by franchise contract or otherwise, curtail the police power vested in the Legislature, nor draw under its dominion subject-matter not otherwise within its jurisdiction.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that a condition expressed in the franchise contract that a street railway shall operate its lines for a period of 49 years as the price of the city's consent to construct its tracks in designated streets is valid, does not contravene the police powers of the State, and therefore the Public Service Commission cannot grant to the company, without the city's consent, permission to abandon certain spur tracks, on the ground that their further operation is unprofitable and wasteful. *Ib.*

**7. Probate Court: Sec. 10, R. S. 1909: Orders Made in Vacation.** Section 10, Revised Statutes 1909, authorizing the probate court, or judge thereof, in vacation, to refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children, is not violative of any provision of

## CONSTITUTIONAL LAW—Continued.

the Constitution. It gives to creditors and other interested parties opportunity to challenge the order by timely action in court; and, besides, the action of the court is not in strict sense judicial, but the statute is similar to many others enacted for the public convenience and to simplify the business before such courts, at a minimum cost, without injury to any one. *Parsons v. Harvey*, 413.

8. **Appellate Jurisdiction: Constitutional Question: Timely Raised.** If the only ground upon which the Supreme Court can have appellate jurisdiction of a case appealed to it is that the constitutionality of a certain statute is involved, the court must decide, although its jurisdiction is not questioned, whether such question was timely lodged in the case. *Bealmer v. Fire Ins. Co.*, 495.
9. ———: ———: ———: **Wrong Section.** If the constitutionality of a certain section was not called in question in the trial court, that question, to be available as determining appellate jurisdiction, cannot be raised by assignment in the appellate court. If, by objections to the introduction of evidence and to the giving of certain instructions and by grounds stated in the motion for a new trial, appellant in the trial court challenged the constitutionality of Section 7047 of the Revised Statutes, it cannot on appeal shift those objections to Section 7052, and have the Supreme Court assume jurisdiction on the ground, first assigned in its brief, that said Section 7052 is unconstitutional for the reasons on which the validity of Section 7047 was challenged in the trial court. *Ib.*
10. ———: ———: **Construing Statute: Due Process.** A wrongful construction of a statute by the trial court, even though it be admitted that such construction renders the statute unconstitutional, does not deprive appellant of its property without due process of law, or deny to it the equal protection of the laws, or introduce into the case a constitutional question in such wise as to confer appellate jurisdiction on the Supreme Court. A wrongful construction does not involve the validity of the statute, but the validity of the court's construction, and a wrongful construction amounts to no more than an erroneous judicial decision. *Ib.*
11. ———: ———: **Mere Assertion.** A mere assertion that a certain section is unconstitutional is not sufficient to confer appellate jurisdiction on the Supreme Court. It is not enough that the instruction merely state that the section is unconstitutional and void because in conflict with named sections of the Constitution without any statement, either in the instruction or the brief, of the facts which create the conflict. *Ib.*

## CONTRACTS.

1. **Street Railway Spurs: Discontinuance: Regulating Use.** The power of the city to regulate the use of streets which the city has consented a street railway company may occupy is to be ascertained by the contractual relation. The public service character of the company subjects it to regulation, but that fact does not determine whether the regulatory power extends to a particular thing. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.
2. ———: ———: **Permission to Occupy: Obligation.** A mere permission granted by the franchise ordinance to a railway company

## CONTRACTS—Continued.

to occupy streets for forty-nine years is not a contract to operate for that period, nor can such an obligation be implied from the permission.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the city has consented that a railway company may construct its lines in the streets upon condition that it operate them for 49 years, the condition is valid, does not transgress the police powers of the State, and can be abrogated only by consent of the city itself. *Ib.*

3. **Fraud and Deceit: Immoral or Illegal Contract: Unlawful Use of Official Position: Recovery.** Courts refuse to grant relief for gambling and other immoral or unlawful contracts, either by enforcing them, or by awarding damages for the breach of them; but where one of the parties is defrauded by a transaction against public policy, he may recover in an action for fraud and deceit the money fraudulently obtained from him. So that where defendants induced plaintiffs to put up money for a half interest in land to be purchased and falsely represented that the property was worth \$32,400 and could not be purchased for less, and further represented that plaintiffs should not be known in the deal for the reason one of defendants was a county commissioner and the other a member of the drainage board and they could get the property cheaper if plaintiffs were not known in the deal, and plaintiffs put up \$16,200 and the deed expressed a consideration of only one dollar and named only one of the defendants as grantee, and it afterwards developed that the entire property had been bought for only \$14,960, a recovery by plaintiff's in their action of fraud and deceit, is not precluded on the theory that they and defendants had entered into an illegal contract or scheme, out of which defendants' liability arose. The rule is that if defendants by misrepresentation of certain facts, or by an illegal use of their official position, induced plaintiffs to enter into an illegal contract and thereby defrauded plaintiffs out of their money, defendants cannot resist recovery by plaintiffs in an action of fraud and deceit on the ground that the scheme was unlawful. *Thompson v. Lyons*, 430.
4. **Excavations: Measurements: Statute Part of Contract.** The statute (Sec. 11971, R. S. 1909) applies to contracts for making earth excavations and must be read as a part of every contract pertaining thereto. Any rates expressed in the contract must be considered in connection with the statute. *Const. Co. v. Gilsonite Const. Co.*, 629.
5. ———: ———: **Trenches: Pier Holes: Special Agreement.** The statute (Sec. 11971, R. S. 1909) provides that earth excavations, where no special agreement is made as to measurements, shall be measured by the cubic yard, and that for trenches and pier holes double measurements shall be allowed. The contract provided that the price for excavating trenches should be \$1.15 "per cubic yard." *Held*, that there was no special agreement as to the measurement of trenches, but the contract called for the statutory "cubic yard," and the contract and statute, when considered together, meant that there should be twice as many cubic yards in the same number of cubic feet in the excavation of trenches as there are in other excavations. And the same is true of pier holes; where the contract said that the price for the excavation

## CONTRACTS—Continued.

for pier holes should be \$2 "per cubic yard," it meant that the whole number of cubic yards of 27 cubic feet each thus excavated should be doubled. In each case the words "cubic yard" used in the contract, when applied to trenches and pier holes, meant just one-half the value of an ordinary cubic yard. *Const. Co. v. Gilsonite Const. Co.*, 629.

6. ———: ———: ———: ———: ———: **In Specifications.** The contract made the specifications "in their entirety" a part of the excavation contract, and they provided that "proposals for the foregoing work are to be based on the cubic yard," first, "for the trenches for retaining walls," and, second, "for the main body of the excavation," and that "estimates are to be based upon the actual amount of material removed according to surveys taken from time to time, by a competent engineer employed by the owner." *Held*, first, that the last clause was not inserted for the purpose of indicating how measurements should be made, but for the purpose of designating by whom they should be made; and, second, there was no special agreement as to the measurements, and the statutory cubic yard was meant, and the statute says that for excavations for "trenches and pier holes double measurements shall be allowed." *Ib.*
7. ———: ———: **Interpretation of Contract: Monthly Settlements.** The interpretation and construction which the parties themselves place upon a contract will be adopted by the court where the contract is ambiguous and reasonably susceptible of different constructions; but monthly payments of eighty-five per cent for work completed, and stated accounts showing the estimates of the excavation work done in cubic yards for trench work and the value thereof, do not indicate that by the words "cubic yards" was meant anything else than the statutory cubic yard, and are not to be considered as a construction of the contract that the contractor was not to be allowed double measurement for such work, as the statute required, unless there is special agreement to the contrary. *Ib.*

## CONTRIBUTION.

**Administration: Sale of Interest by Heir: Voluntary Conveyance by Other Heirs to Pay Debts.** The joining by non-indebted heirs of an estate in the course of administration, in a private sale and conveyance of other estate lands, to obtain money with which to pay debts primarily those of another heir, but allowed against decedent's estate, and the payment thereby of such debts, cannot be considered as a voluntary loaning by such heirs to such debtor heir or to the estate of the money to pay his or its debts, but are acts in their nature coercive, brought by his delinquency, and neither he, nor another claiming his interest in another tract as purchaser at the foreclosure of a deed of trust made by him after decedent's death to pay his individual debts, can take advantage of a situation brought about by his wrong. An heir indebted to decedent's estate, by reason of decedent's suretyship for him or otherwise, has in equity against the other heirs no definite share or interest in the estate, unless he pays such indebtedness, and failing to do so his interest or share is cut down to the extent of his debts to the estate; and the purchaser at the foreclosure of a deed of trust, by which he conveys his interest in the remaining lands to secure the payment of an

## CONTRIBUTION—Continued.

individual debt, takes subject to the right of the other heirs, who have conveyed estate lands to pay estate debts, to be reimbursed out of his original share in such lands. *Ridings v. Bank*, 288.

## CONVEYANCES.

1. **Deed as Mortgage: The Word Redeem: Intention.** Whether or not a deed, otherwise absolute, is to be construed to be a mortgage, is not to be determined by the use of the word "redeem" used in a stipulation clause therein by which the grantee agrees that the grantors "may at any time within ten years redeem said land" and upon the payment of a named sum of money he "will reconvey" to them, for though the word is appropriate to express an equitable right of redemption, it is not of fixed meaning, and the nature of the instrument, whether mortgage or conditional sale, is not determined by its use, but by the intention of both parties at the time it was made. If made to be a mortgage it retains the character then intended; otherwise, a deed absolute on its face, with an agreement to reconvey upon conditions, cannot be construed to be a mortgage, but is a conditional sale or deed of purchase. *Carson v. Lee*, 166.
2. **Covenants: In Deed and Mortgage.** A vendee who secures payment to his vendor of the price of his purchased property by mortgaging back with covenants the estate granted, does not thereby release the vendor from liability on his similar covenants. *Crosby v. Evans*, 202.
3. ———: ———: **Running With the Land.** The covenant of indefeasible seizure runs with the land when the deed containing it passes any interest to carry the covenant along, the purpose being to enable a remote grantee substantially damaged by the breach to recover his damage; but a purchase-money mortgage or deed of trust, given by a grantee who suffers from his grantor's broken covenant, does not carry back to the grantor the right to sue on the covenants in the original deed or cancel those covenants. *Ib.*
4. **Latent Ambiguity: Admissibility of Acts of Parties.** When there is a latent ambiguity in the description of land as contained in the deed, the circumstances and situation of the parties and the construction they have put upon the deed by their acts, are admissible in evidence; but when the language of the deed contains no ambiguity, or when such language, applied to the subject-matter and circumstances, leaves no substantial doubt as to the property conveyed, then the acts of the parties under the deed are inadmissible. *Korneman v. Davis*, 234.
5. ———: **Quantity.** An estimate of the land conveyed by a deed as "about thirty acres" is a part of the description, and may be used to ascertain the particular thing conveyed. *Ib.*
6. ———: **Beneficent Acts of Grantor.** Where a father conveyed thirty acres of land lying south of a creek, as a gift to a daughter, reserving a life estate to himself, the taking possession by the daughter of an adjoining four-acre tract lying east of the creek and his acquiescence therein, a gift of a small amount of money arising from the sale of logs therefrom and a failure of the father to object to her taking timber therefrom to build an ice-house, are to be regarded as other acts of kindness towards the



## CONVEYANCES—Continued.

daughter without regard to his or her legal rights, and not as an interpretation by conduct of the description of the land contained in the deed, and are not admissible to show that the four-acre tract was conveyed. *Korneman v. Davis*, 234.

7. **Interest and Not Land.** The granting clause of a deed of trust whereby the grantor doth "grant, bargain, sell, convey and confirm unto the said second party the following real estate: All of his right, title, share and estate in and to" certain lands, conveys whatever interest the grantor has, but not the land itself. The words "grant, bargain, sell, convey and confirm" do not purport to convey or warrant the land, or any particular interest therein, but only such right, title, interest or estate as the grantor has, whatever that interest may be. *Ridings v. Bank*, 288.
8. ———: **Administration: Innocent Purchaser.** A purchaser for value at the foreclosure sale of a deed of trust by which the grantor conveyed his interest in certain land, and not the land itself, made during the course of the administration of his father's estate to secure the payment of his individual debt, acquired whatever right, title and interest the grantor had, subject to all equities the other heirs had against his share or interest in said property. A purchaser at said foreclosure sale, though for value, is not an innocent purchaser, but similar to the grantee in a quit-claim deed, who takes with notice, actual or constructive, of the equities of third parties. *Ib.*
9. **Description: Starting Point: Parallelogram Presumed.** A lease which describes a tract in the City of St. Louis and State of Missouri as "one hundred feet running westward on Coal Bank Road, beginning at private road fronting house, and seventy feet running northward on private road, beginning at Coal Bank Road." fixes the starting point at the intersection of Coal Bank Road and the private road, and that being definite, a parallelogram, one hundred by seventy feet, will be presumed; and a definite tract extending one hundred feet westward, from the intersection of the two roads, along the north side of Coal Bank Road, and seventy feet northward along the west line of the private road, was described. *Kleine v. Kleine*, 317.
10. **Signing Deed: With Lead Pencil.** A deed or lease is not invalid because signed by lead pencil, instead of pen and ink. *Ib.*
11. **Voluntary: No Consideration: Cancellation: Lien.** A deed made by a grantor in full possession of his faculties and in no wise induced by undue influence or fraud, but voluntarily and of his own volition and without any agreement or promise on the part of the grantee, either directly or through others, to either pay money therefor or to support and care for the grantor in his old age, but made in pursuance of a long-cherished purpose to so dispose of the land, either by deed or will, that the grantee would own it after the grantor's death, cannot be set aside, nor can a lien be declared on the land for supposed damages. *Hardaway v. Hardaway*, 403.
12. **Mutual Mistake: Intention: Reformation.** A deed is presumed to express the final agreements of the parties only when it in fact expresses their intention. Where the intention of the parties

## CONVEYANCE—Continued.

is not expressed, but the deed recites mutual mistakes, a court of equity can reform it to express their intention. *Maze v. Boehm*, 507.

13. **Existence of Deed: Presumption: Payment of Taxes.** In the absence of any record, proof that a deed was made by the patentee to defendant's ancestor may be made either (1) by proof of such facts as will raise a presumption that such deed was made or (2) by direct evidence that such deed was made and had been lost or destroyed. But the presumption that a deed was made cannot arise from the mere payment of taxes for a period of years, either by such ancestor or his heirs or grantees; but ancient and long possession, coupled with other circumstances, will justify the presumption. Nor will evidence that defendant's ancestor was in possession of a patent, in which he was not named as patentee, aid the presumption that a deed was made by said patentee to him as grantee. And the presumption aside, and no record of a deed or possession of the land being shown, the evidence should show a deed in fact. *Brooks v. Roberts* 551.
14. **Construction: The Whole Instrument: Granting Clause: Habendum.** In construing a deed, the intention of the parties, as gathered from the entire instrument, together with the surrounding circumstances, are to be ascertained and given effect, unless in conflict with some positive rule of law or repugnant to the terms of the grant itself; and in gathering such intention from the instrument, the court will ignore technical distinctions between the various parts and seek the grantor's intention from them all, without undue preference to any, giving due effect to all, even to the extent of allowing the *habendum* clause to qualify or control the granting clause where it is manifest that the former, in connection with the whole, more nearly expresses the grantor's intention. *Welch v. Finley*, 684.
15. ———: ———: ———: **Parenthetical Clause.** The deed made in 1867 recited that the grantors, "in consideration of the regard and affection we have for our daughter Fannie E. Finley and of the payment of eight hundred dollars by William Finley," do "hereby convey and sell to said Fannie and William two hundred and fifty acres.....most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to Fannie." *Held*, that the granting clause is a clear and unambiguous conveyance to Fannie and William, and is not limited by the last parenthetical words, which are of doubtful and uncertain meaning and application.  
*Held*, by WILLIAMSON, J., dissenting, with whom BLAIR and GOODE, JJ., concur, that if an estate by the entirety had been intended the intention would have been expressed in some other words than the mere granting clause, and that the instrument as a whole declared an express purpose of a sale of fifty acres to William and a gift of two hundred to Fannie, and that purpose is strengthened by the order in which the grantees are named, in that the granting clause says that the grantors "convey and sell to Fannie and William," which in effect means that they convey to Fannie and sell to William  
 Ib.

## CONVEYANCE—Continued.

16. ———: ———: ———: ———: **No Several Tract: Husband and Wife: Change in Law.** That the clear words of the granting clause were not restricted by the ambiguous subsequent clause is reinforced by two other facts: *first*, the deed contains no word or phrase indicating that the grantors intended to convey in severalty to their daughter and her husband distinct parcels; and, *second*, at the time the deed was made (1867) the notion of unity of property and person of husband and wife was firmly fixed in the popular mind and in the law, and it was not unusual for a father, when he gave real estate as an advancement to a daughter, to deed it to both.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that a gift, by deed, to the daughter alone, had no tendency to divert the title from the descendants of the grantors, and to construe the deed in judgment as a conveyance of an estate by the entirety to the grantors' daughter and her husband, and the vesting of the title first in him by her death and then in his collateral kindred upon his death is to vest the title in strangers to the grantors' blood, which is a result in no wise contemplated by the terms used in the deed. *Welch v. Finley*, 684.

17. ———: **The Word "Sold."** The word "sold," unaccompanied by others of apter significance, is not ordinarily a word of conveyance, but will be so considered in a proper setting, or where clearly so intended.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that the natural order of the words in a conveyance, and the usual sequence of events, is "sell and convey," and not "convey and sell;" and this reversal of the order in a deed by parents to a daughter and her husband, by which they "convey and sell to Fannie and William," is of significance, for there, the deed expressing as its consideration regard and affection for the daughter and a payment of \$800 by her husband, the meaning is that they conveyed to the daughter (the two hundred acres subsequently mentioned in the deed) and sold to him (the fifty acres mentioned therein). *Ib.*

## EVIDENCE.

1. **Deed: Intention: Extraneous Evidence.** The terms of a deed may show so clearly on its face the real understanding of the parties, that no aid from extraneous circumstances is required or permitted to interpret it. On the other hand, it may leave the question whether it is a mortgage or deed of purchase in such doubt, that extraneous evidence is necessary to determine its character, and then such evidence is competent. *Carson v. Lee*, 166.
2. ———: ———: **Repayment.** The fact that the stipulation in the deed permitting the grantors to redeem and obligating the grantee to reconvey on the payment of a named sum, contained no agreement binding the grantors to pay the sum named or any part of it, is a circumstance of weight, though not conclusive, in determining whether or not the instrument was a mortgage. *Ib.*
3. ———: **Possession: Taxes: Surplus After Paying Debts.** The facts that the grantee was put into possession when the instrument was executed, that he was by it required to pay the taxes thereafter,

**EVIDENCE—Continued.**

- and where the grantors were financially embarrassed, that the consideration was more than grantors' debts paid by him and the balance was turned over to them, without note or other evidence of a loan, all likewise point significantly to a conclusion that the instrument was not a mortgage. *Ib.*
4. ———: **Subsequent Indemnifying Bond.** The fact that the purchaser from the grantee in a deed which contained a stipulation that the grantors might redeem upon the payment of a named sum of money, exacted of the surviving grantor and the grantee a bond to indemnify himself against loss because of an apprehended possible right in the heirs of the deceased grantor to redeem, and that of the purchase price paid by said purchaser a part was paid to said surviving grantor, whose ten-year right to repurchase had not expired, sheds no light on said original transaction and has no tendency to prove that said original deed was a mortgage, for the character of the transaction was fixed when said deed was made. *Ib.*
  5. **Charity: Shown by Articles: Parol Evidence.** An association whose purposes are to nurse the sick and establish and support a home where deaconesses are to be educated and trained to serve as nurses for sick and aged persons admitted to the home, whose members are required to believe in the creed of the Apostles and are to pay annual dues and receive no dividends or compensation, and whose directors have no power to distribute funds to its members as profits or otherwise, but only to use them to carry out its charitable and benevolent objects, is a charitable association. And all these facts appearing from its articles of association, parol evidence to show its charitable character is not necessary, but evidence to the effect that its funds, whether received from dues or donations or derived from pay patients, were held in trust for the charitable and benevolent purposes of the organization, does not destroy or alter its character as a charity. *Nicholas v. Deaconess Home*, 182.
  6. **Practice: Further Evidence After Demurrer.** To permit plaintiff to introduce further evidence after he has rested and after a demurrer to the case as then made has been argued is a matter within the trial court's discretion. *Crosby v. Evans*, 202.
  7. **Conveyance: Latent Ambiguity: Admissibility of Acts of Parties.** When there is a latent ambiguity in the description of land as contained in the deed, the circumstances and situation of the parties and the construction they have put upon the deed by their acts, are admissible in evidence; but when the language of the deed contains no ambiguity, or when such language, applied to the subject-matter and circumstances, leaves no substantial doubt as to the property conveyed, then the acts of the parties under the deed are inadmissible. *Korheman v. Davis*, 234.
  8. **Account Rendered: Implied Acquiescence and Promise: Reasonable Time.** What constitutes a reasonable time in which to object to an account rendered depends on the circumstances of the particular case. One circumstance is the local situation of the parties. Acquiescence for a whole year, without objection by the female owner of a large farm, in the itemized accounts rendered by her agent, accompanied by a letter explaining her overdraft and the amount credited on her note for money advanced

## EVIDENCE—Continued.

- by him, and calling attention to the balance, together with other letters written in the subsequent months to each other in which reference is made to the state of the account, amounts to an account stated, and in the absence of fraud, mistake or accident forecloses a readjustment. *Dameron v. Harris*, 247.
9. **Account Book Entries: Contemporaneous.** Regular entries in an account book made in the course of business to be competent as evidence and an exception to the rule against hearsay must be made at the time of the transaction noted, or soon enough after the event to be in the nature of *res gestae* and to render it unlikely that they were the result of a design to defraud, concocted by the entrant after the occurrence. But if they were made immediately following the transaction if it occurred in the office where the account book was kept, or promptly after the agent's return thereto from the place where the business was transacted, they are substantially contemporaneous, and competent. *Ib.*
  10. **Description of Lands: Ambiguity: Extrinsic Evidence.** Extrinsic evidence is always admissible to explain the calls in a deed and for making certain any ambiguity in the description. If a surveyor can take the deed and from its descriptions, locate with certainty the definite tract intended to be conveyed, the description is sufficient. *Kleine v. Kleine*, 317.
  11. **Experiments: Similar Conditions.** For experiments made to determine whether certain signs painted on the automobile truck which struck the plaintiff were visible by plaintiff and his companion, conditions under which the incident in dispute happened must be the same in essential particulars as those under which the tests were made; and in this case, in which was admitted the testimony of several witnesses for plaintiff to prove, by way of experiments, that it was possible for the two boys to have read the sign, as they testified they did, it is held that the conditions were not sufficiently reproduced in the experiments for the result to be admitted in evidence. *Ballman v. Teaming Co.*, 342.
  12. **Former Pleading.** An answer, abandoned by the filing of an amended one, may be offered in evidence by plaintiff as an admission on defendant's part. *Parsons v. Harvey*, 413.
  13. **One Party Dead: Denial of Other Testimony.** In a suit on a note given by defendant to his deceased mother, defendant is a competent witness to deny conversations occurring after her death to which plaintiff's witnesses have testified, but he is not a competent witness to deny that a conversation took place between him and her wherein he agreed to pay her funeral expenses in addition to the amount of the note. *Ib.*
  14. **Deed: Reformation: Character of Proof.** The burden of proof is on the party asserting that the deed did not express the intention of the parties, to establish the mistake and its mutuality, but such proof need not reach the high standard of beyond a reasonable doubt, but is sufficient if cogent, clear and convincing. *Maze v. Boehm*, 507.
  15. **Limitations: Possession: Pertinent to Good Faith.** Although a suit to quiet title does not turn on the question of adverse possession, but on the issue of mutual mistake in the description of the land in the deeds under which defendants claim, testimony regarding

## EVIDENCE—Continued.

their possession is pertinent for consideration, as showing their good faith and intention in the transaction out of which their claim originated. *Ib.*

16. **Cross-Examination of Own Witness: New Matter.** Where a witness for defendant, on his cross-examination by the State, has testified to material new matter, the counsel for defendant, in re-examining him as to such new matter, is entitled to a specific answer, and an objection to such re-examination is not to be sustained on the theory that he is defendant's witness and defendant's counsel is not entitled to cross-examine him. The new matter having been brought out by the State, defendant is entitled to have the witness state exactly what defendant said to him, and not his mere conclusion. *State v. Barnes*, 514.
17. **Other Disconnected Difficulties.** Evidence of quarrels and violent threats by defendant with other parties, prior to the homicide but on the same night, with which deceased was in no wise connected and was not present, is not admissible. *State v. Palmer*, 525.
18. **Venue: How Proven.** Venue in a criminal case may be established in the same way as any other material fact. It may be established by direct testimony, or it may be inferred by the jury from all facts and circumstances in evidence from which the inference may be reasonably drawn. The inference that the homicide was committed in the county in which the information was filed may be drawn from testimony showing that a certain school house was in the county and west of its east county line, and that deceased was shot 650 feet west of the school house. *Ib.*
19. **Verdict: Excessive: \$10,000.** Under the Federal Act, an injured employee is entitled to such damages as will compensate him for expenses incurred, loss of time, suffering and diminished earning power, and the amount recoverable is not otherwise limited or restricted, except where he has been guilty of contributory negligence; and there being no such negligence, a verdict of \$10,000 for the loss of an arm and a gash above the eye which impairs the sight, supported by substantial evidence and approved by the trial court, vested with authority to set it aside if excessive, is approved. *Lock v. C., B. & Q. Ry. Co.*, 532.
20. **Substantial for Plaintiff: Appellate Practice.** If plaintiff's testimony that he stumbled over a brake-beam lying in defendant's railroad yard is substantial, and is not contrary to reason, the appellate court will accept the verdict of the jury finding it to be true. *Ib.*
21. **Dangerous Place: Brake-Beam in Yards: Constructive Notice of Location.** At different times cars were repaired in defendant's railroad yard, their parts separated, and it was customary to take out brake-beams and drop them near at hand, to be subsequently removed; a car was being repaired near the scene of the accident on the day preceding it; the yard belonged to defendant and was fenced; and plaintiff, a switch-tender, testified that having aligned the rails so as to permit a train to pass, at four o'clock of a dark and rainy December morning, he started to walk across the yard to a shanty where he stayed when not engaged in adjusting the switches, and while looking ahead to determine his course, he stumbled over a brake-beam, fell to the ground, and before he

## EVIDENCE—Continued.

- could arise a switch engine on a lead track struck him. *Held*, that the other facts were circumstances confirmatory of plaintiff's testimony, and that, under the Federal Employers' Liability Act, defendant cannot escape liability on the ground that the evidence failed to show it had either actual or constructive notice of the location of the brake-beam. *Lock v. C., B. & Q. Ry. Co.*, 532.
22. **Brake-beam in Yards: Constructive Notice: Act of Servant.** Under the Federal Employers' Liability Act, a switch-tender is not required to show a negligent placing of a brake-beam in the railroad yards, over which he stumbled and fell; but the leaving of the beam at said point was a negligent act and bound the company as effectually as if it, as principal, had left it there. *Ib.*
23. ———: ———: **Evidence of Customary Acts.** Where the railroad yard through which the switch-tender passed in going in the night time to a shanty in which he stayed between his acts in aligning tracks, was used by defendant in the conduct of its business, testimony that it was the practice of the employees to scatter materials over the yard in repairing cars is admissible, the switch-tender having stumbled over a brake-beam in the yards and having been injured thereby. While such acts are in a sense collateral, an inference of fact bearing on the particular act of negligence may properly be drawn from them. *Ib.*
24. ———: ———: **Collateral Fact.** The rule is that if a collateral fact bearing on the main issue is so intimate and valuable as to tend to prove the main fact, it is competent evidence. *Ib.*
25. **Intent: Specific Proof: Inference.** Even if proof of specific intent to maim another is necessary in view of the language of the statute, proof of facts from which the intent may be inferred is sufficient; and such inference may be drawn from proof that defendant shot another with a double-barreled shot-gun, loaded with leaden balls and gun powder, on purpose and of malice aforethought, and inflicted wounds calculated to maim. *State v. Foster*, 618.
26. ———: **To Maim: Meaning.** The word "maim" has no technical meaning, but means to inflict some serious bodily injury. Thus classified, there is no occasion to couple the commission of the act of shooting at another with a specific "intent to maim" in order to constitute the offense denounced by the statute (Sec. 4481, R. S. 1909). *Ib.*
27. **Impeachment: Place of Residence.** Objections to an inquiry of witnesses for their knowledge of plaintiff's general reputation in a given place, is not an objection to their competency to testify. *Ulrich v. C., B. & Q. Ry. Co.*, 697.
28. ———: **General Reputation: In Community.** Plaintiff is subject to impeachment like any other witness, and general reputation is admissible to prove his character as it exists at the time of the trial, and reputation, to be competent, must be made up of what is generally said of the witness by those who have sufficient opportunity to observe his life and actions, and ordinarily they are the persons in the neighborhood or community in which he resides, but it is not impossible for him to have a general reputation for veracity in more than one community. *Ib.*

## EVIDENCE—Continued.

29. ———: ———: ———: **Former Residence.** The discretion of the trial court is not abused by the admission of testimony relating to the witness's reputation in a community in which, beginning nine or ten years previously, he resided for several years, and in which he was widely and generally known and which he frequently revisited and there piled his vocation of selling spectacles and jewelry. *Ib.*
30. ———: ———: **Neighborhood and Community.** The term "neighborhood" or "community" is not susceptible of exact geographical definition, but means in a general way the place where the person has established a reputation, whether that be his present or former residence or place of business. It is not necessarily confined to a particular locality, but may be co-extensive with his residence or place of business, or both, or to places of present and former residence, if he in such places came into such frequent association with persons there as to establish a reputation. In the absence of a showing to the contrary, the inquiry as to his reputation should be confined to the neighborhood of residence; but where there are additional facts to show the establishment of a reputation elsewhere, the court does not abuse its discretion by permitting witnesses to testify what his general reputation in such other place is or was. *Ib.*

## EXCAVATIONS.

1. **Measurements: Statute Part of Contract.** The statute (Sec. 11971, R. S. 1909) applies to contracts for making earth excavations and must be read as a part of every contract pertaining thereto. Any rates expressed in the contract must be considered in connection with the statute. *Const. Co. v. Gilsonite Const. Co.*, 629.
2. ———: **Trenches: Pier Holes: Special Agreement.** The statute (Sec. 11971, R. S. 1909) provides that earth excavations, where no special agreement is made as to measurements, shall be measured by the cubic yard, and that for trenches and pier holes double measurements shall be allowed. The contract provided that the price for excavating trenches should be \$1.15 "per cubic yard." *Held*, that there was no special agreement as to the measurement of trenches, but the contract called for the statutory "cubic yard," and the contract and statute, when considered together, meant that there should be twice as many cubic yards in the same number of cubic feet in the excavation of trenches as there are in other excavations. And the same is true of pier holes; where the contract said that the price for the excavation for pier holes should be \$2 "per cubic yard," it meant that the whole number of cubic yards of 27 cubic feet each thus excavated should be doubled. In each case the words "cubic yard" used in the contract, when applied to trenches and pier holes, meant just one-half the volume of an ordinary cubic yard. *Ib.*
3. ———: ———: ———: ———: **In Specifications.** The contract made the specifications "in their entirety" a part of the excavation contract, and they provided that "proposals for the foregoing work are to be based on the cubic yard," first, "for the trenches for retaining walls," and, second, "for the main body of the excavation," and that "estimates are to be based upon the actual amount of material removed according to surveys taken from



## EXCAVATIONS—Continued.

time to time, by a competent engineer employed by the owner." *Held*, first, that the last clause was not inserted for the purpose of indicating how measurements should be made, but for the purpose of designating by whom they should be made; and, *second*, there was no special agreement as to the measurements, and the statutory cubic yard was meant, and the statute says that for excavations for "trenches and pier holes double measurements shall be allowed." *Const. Co. v. Gilsonite Const. Co.*, 629.

## FRAUD.

**Account Rendered: Readjustment: Continuous Account: Fraud or Mistake.** Acquiescence in an account stated does not preclude one of the parties from showing that certain items were not embraced in it, if a proper suit is brought to amend the adjustment for fraud, mistake or accident; but such a suit must proceed upon the theory that the account had been adjusted and items omitted which should have been included; if the demand is based on the theory that the account was a continuous one for twenty years, with no adjustment of it at any time, the only question of inquiry is whether there had been periodical settlements within those years, with such acquiescence therein for a reasonable time under the circumstances as render them accounts stated, and if the facts establish those things the settlements cannot be reopened. *Dameron v. Harris*, 247.

## FRAUD AND DECEIT.

1. **Pleading: Cause of Action.** A petition alleging that defendants represented to plaintiffs that a certain tract of 10.4 acres was worth \$3000 an acre, that it could be bought for such sum, that relying on said representations plaintiffs put up \$16,200 for the purchase of a half interest in the land, that said representations were false and made to deceive and defraud plaintiffs, states a cause of action with sufficient clearness to authorize the introduction of evidence to support it, there being no demurrer filed. *Thompson v. Lyons*, 430.
2. **Verdict of Jury.** The verdict of a jury in an action for fraud and deceit concludes the credibility of the witnesses who testified to the substantial facts necessary to support a petition stating a cause of action. *Ib.*
3. **Limitations: Purchase of Land Situate in Another State: Applicatory Statute.** In an action for fraud and deceit, practiced by defendants upon plaintiffs, resulting in the purchase of land situate in another state, the question of limitations is governed by the statute of such foreign state, since the transaction occurred in said state, although the suit is brought in this State. *Ib.*
4. ———: **Fraud: Discovery: Diligence.** The statute of the foreign state in which the land transaction occurred, providing that "an action for relief on ground of fraud" shall be brought within two years, but that "the cause of action shall not be deemed to have accrued until the discovery of the fraud," cannot be held to bar the action on the sole ground that no facts were pleaded or proven to show that reasonable diligence was used to discover the fraud. The said statute has been construed by the courts of the foreign state to mean that if for any reason no obligation exists

## FRAUD AND DECEIT—Continued.

to consult the record which the law requires to be kept as the source of information, or if the defrauded person be circumvented from taking advantage of his opportunity, no duty rests upon the defrauded person to improve with diligence the opportunity of learning that which the record discloses. No duty rests upon the defrauded person to examine records which do not impart notice, but which are the records of a private realty company, to whose books he has no right of access. *Ib.*

5. ———: ———: ———: ———: **Recorded Deed: Consideration of One Dollar.** The Supreme Court of Kansas holds that a record imparts notice only of what it contains. The record of a deed reciting a consideration of one dollar is not notice that the purchase price of the land was \$14,920, instead of \$32,400, which defendants represented to plaintiffs was the purchase price. That record imposed no duty on plaintiffs to use diligence to discover the fraud. *Ib.*
6. ———: ———: ———: ———: **Fiduciary Relation: Partners.** Where plaintiffs and defendants had entered into partnership for the purchase of the land and defendants represented to plaintiffs that the land was worth \$32,400 and induced plaintiffs to put up \$16,200 for the purchase of a half interest, and with the money thus placed in their hands defendants bought the entire tract for \$14,960, and a deed conveying the tract to one of them expressed a consideration of only one dollar, there existed a fiduciary relation, and the plaintiffs had a right to rely on defendants' representations and were not required to use diligence to discover that they were false, and the Statute of Limitations did not begin to run until they actually discovered the fraud. *Ib.*
7. ———: ———: ———: ———: **Pleading.** Where plaintiff merely alleges that he did not discover the fraud until a certain date, and defendant, without questioning the sufficiency of the petition, goes to trial, he cannot complain that the petition did not sufficiently plead reasonable diligence to discover the fraud. Besides, where the bar to the action is first raised by defendant's plea of the statute of the state where the transaction occurred, and in reply to that plea plaintiff alleges that the facts constituting the fraud were not discovered by him until a certain date, and no objection to the sufficiency of the reply is made, there is no room for a complaint that the petition did not allege reasonable diligence to discover the fraud. *Ib.*
8. ———: ———: **Time Between Death of Defendant and Administration.** The time elapsing between the death of a defendant and the appointment of his administrator is excluded in computing the time the Statute of Limitations has run. So that, in an action for fraud and deceit, if the time between the date when the fraudulent transaction was closed up and the date when defendant's administrator was brought in has not been five years, excluding the time which elapsed between the death of the defendant and the appointment of his administrator, the action is not barred by the Missouri Statute of Limitations. *Ib.*
9. **Immoral or Illegal Contract: Unlawful Use of Official Position: Recovery.** Courts refuse to grant relief for gambling and other immoral or unlawful contracts, either by enforcing them, or by awarding damages for the breach of them; but where one of the

**FRAUD AND DECEIT—Continued.**

parties is defrauded by a transaction against public policy, he may recover in an action for fraud and deceit the money fraudulently obtained from him. So that where defendants induced plaintiffs to put up money for a half interest in land to be purchased and falsely represented that the property was worth \$32,400 and could not be purchased for less, and further represented that plaintiffs should not be known in the deal for the reason one of defendants was a county commissioner and the other a member of the drainage board and they could get the property cheaper if plaintiffs were not known in the deal, and plaintiffs put up \$16,200 and the deed expressed a consideration of only one dollar and named only one of the defendants as grantee, and it afterwards developed that the entire property had been bought for only \$14,960, a recovery by plaintiffs in their action of fraud and deceit, is not precluded on the theory that they and defendants had entered into an illegal contract or scheme, out of which defendants' liability arose. The rule is that if defendants by misrepresentation of certain facts, or by an illegal use of their official position, induced plaintiffs to enter into an illegal contract and thereby defrauded plaintiffs out of their money, defendants cannot resist recovery by plaintiffs in an action of fraud and deceit on the ground that the scheme was unlawful. *Thompson v. Lyons*, 430.

10. **Measure of Damages.** Where one person makes a purchase for another, or where one of two or more joint purchasers conducts a joint purchase, and falsely represents that the price is actually greater than what is actually paid for the property, the measure of damages is the difference between the amount actually paid by the party defrauded and the true purchase price. So where defendants, in an endeavor to induce plaintiffs to join with them to purchase land, represented that the property was worth \$3000 per acre, whereas it was actually bought by defendants for less than \$1500 per acre, the court properly refused an instruction directing the jury to return a verdict for defendants if at the time plaintiffs bought a half interest the property was reasonably worth \$3000 per acre; but properly instructed the jury to assess plaintiffs' damages, if they found for plaintiffs, at the difference between what plaintiffs paid defendants for a half interest and one-half the amount defendants actually paid to the grantor for the entire tract. *Ib.*

**GARNISHMENT.** See *Attachment*.

**GENERAL REPUTATION IN NEIGHBORHOOD.** See *Reputation*.

**GUARDS TO MACHINES.** See *Machinery*.

**HABEAS CORPUS.**

1. **Constitutionality of Law.** If a person is deprived of his liberty for any act not in contravention of an existing law, or if the act or ordinance under which he is held is unconstitutional, whether the offense denounced by it is classified as a misdemeanor or a felony, *habeas corpus* is available to restore him to his freedom. *Ex parte Lerner*, 18.
2. **Validity of Ordinance: Special Classes.** An ordinance regulating the use of streets, to be valid, must be general in its terms and uniform in its application to the class of persons or subjects to be

## HABEAS CORPUS—Continued.

affected. If it seeks to regulate citizens in the otherwise lawful use of their property or the conduct of their business, the rules and conditions by it required to be observed must be so specified that all citizens may be required to comply with them. *Ib.*

3. ———: ———: **Soliciting Business.** An ordinance which seeks to punish any person who shall accost another on a street in front of any store and solicit such person to purchase, at another store, goods, wares or merchandise of like nature as those kept in such store, is invalid, since it does not apply to all persons or streets alike, but is special in its terms and local in its application, and contravenes the constitutional provision that—"where a general law can be made applicable, no local or special law shall be enacted." *Ib.*

## HOMESTEAD.

1. **Will: Intention: Life Estate or Homestead.** The will provided that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, that the will gave to testator's wife, not a homestead simply, to be terminated upon her subsequent marriage, but a life estate. *Wetzel v. Hecht*, 610.
2. ———: ———: **Homestead During Life.** Where the will declares that "my homestead shall be left intact so long as my wife lives," the estate of the wife cannot be terminated by her subsequent marriage without ignoring the words "so long as she lives," and also the word "intact." *Ib.*
3. ———: ———: **Homestead and Quarantine.** If it be contended that by the word "homestead" used in the will declaring "my homestead shall be left intact as long as my wife lives" the testator had in mind the statutory homestead given by Section 6708, Revised Statutes 1909, whereby the widow, there being no minor children, is vested with a homestead during her life or widowhood, it may as well be contended that he had in mind Section 366, which provides that a widow, until dower be assigned, may remain in and enjoy the mansion home. *Ib.*
4. ———: ———: **Quarantine and Assignment of Dower.** Under Section 366, Revised Statutes 1909, which provides that a widow may remain in and enjoy the mansion house until dower be assigned, her quarantine interest is not lost until dower is assigned, and by virtue of that interest she may maintain or defeat ejectment, or she may convey it and her grantee acquires the same right. And if the will declared "my homestead shall be left intact so long as my wife lives," her dower cannot be assigned during her life, and consequently her quarantine right must remain undisturbed as long as she lives, for otherwise the homestead could not remain "intact." By the words used the testator enlarged the estate which the statute gave his widow, and removed the contingency upon which it would terminate on her remarriage, and the result is a life estate by implication. *Ib.*

## CORPORATIONS.

1. **Sale of Properties: Liability of Vendee for Unpaid Debts: Preference.** Where one company took from another a large amount

## CORPORATIONS—Continued.

of property, far in excess of the claim of a judgment creditor of the vendor, for which the said transferee paid no consideration and to which it acquired no title, and placed it beyond the reach of such creditor, such transferee company must pay such judgment creditor. The vendor has the undoubted right to prefer one creditor to another, but it cannot transfer the exercise of the right to another company, so as to authorize the transferee to administer the vendor's assets. [Per CRAMER, Special Judge; WILLIAMSON, J., concurring, in a separate opinion in which WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Railways*, 247 Mo. 1. c. 366.] *Johnson v. United Rys.*, 90.

2. **Sale of Properties: Unpaid Judgments: Amount Paid by Assignee: Clean Hands.** If the amount paid by the assignee of unpaid judgments is the refuses to pay, the assignee has a justicable claim against the transferee, and is not chargeable with coming into court with unclean hands for that he paid only one-third of their value. [Per WILLIAMSON, J.] *Ib.*
3. ———: ———: **Directors Trustee for Creditors.** To the extent to which the assets of a corporation may be regarded as a trust fund for its creditors, the directors are trustees of those assets for such creditors; and where a corporation transfers all its tangible assets to another, the president of such corporation is a trustee for the benefit of those persons who had existing claims against the corporation. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.] *Ib.*
4. ———: ———: ———: **Notice.** Where two corporations, at the time one of them transferred all its tangible assets to the other, had the same executive officers, the same claims department, the same counsel, and, with the exception of one member of each board, the same individuals upon the board of directors of each, the transferee company was chargeable with notice of the existence of judgments and suits for judgments against the other company, whether or not the transferee company, in the assignment instruments, assumed to pay such claims. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.] *Ib.*
5. ———: ———: **Assets in Excess of Consideration.** Where one corporation in consideration of the release of a lease under which another was operating a system of street railways, took over all its tangible assets, assuming to pay its bonded and other contract debts, but not existing judgments for personal injuries, and thereby received property far in excess of the amount of the debts assumed, without paying any consideration for such excess and without the consent of such judgment creditors, leaving their judgments unsatisfied, and took the property under such circumstances as to amount to actual notice of such outstanding claims, the transferee company is legally bound to pay such claims, since the assets of the transferring company constituted a trust fund for the payments of its debts, and a transfer of assets, without consideration, is void as to creditors of the transferor, though it assumed legal form. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Rys. Co.*, 247 Mo. 1. c. 366.] *Ib.*

## CORPORATIONS—Continued.

6. ———: **Assignment, Sale or Release: Substantive Wrong: Equity.** It matters not by what name the transaction by which one corporation transferred all its assets to another is characterized, whether as a sale or assignment or the release of an existing lease, if its effect was to turn over, without consideration, a trust fund held by the one to pay its debts, to the other, and such transferee took the assets, knowing that they far exceeded the debts assumed, and with notice of the unpaid debts of the other, equity will hold the transfer void as to the existing creditors. Equity looks to substance and not form, and will not sanction an unconscionable result merely because it has been brought about by means which simulate legality. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur.]
7. **Non-resident Insurance Company: Citizen of County: Process: Statute.** The statute (Secs. 7398 and 7399, R. S. 1909), authorizing process to be served on the Superintendent of Insurance where the defendant is a foreign insurance company licensed to do business, but having no place of business, in this State, does not render the company a resident of the county in which plaintiff resides and in which it has been sued before a justice of the peace, but only confers jurisdiction; as to the time within which it must take an appeal from a judgment rendered by the justice, it still remains a non-resident of the county. *Donohue v. Ins. Co.*, 267.

CORAM NOBIS, WRIT OF ERROR. See *Writ Coram Nobis*.

## COURTS.

**Practice: Finding of Facts.** A statutory finding of facts should embrace all the material facts bearing on the issues involved, and should set them out in detail, and not merely state conclusions and inferences therefrom. *Korneman v. Davis*, 234.

See, also, **Conflict of Opinions, and Administration**, 11.

CREDITOR AND DEBTOR. See **Assignment**.

## CRIMINAL LAW.

1. **Information: Sufficiency: All Words of Statute.** The Constitution declares that in criminal prosecutions the accused shall have the right to "demand the nature and cause of the accusation," and that means that the information shall specifically bring the accused within all the material words of the statute he is charged with having violated. In criminal pleading it is an inflexible rule that, in the indictment or information for a felony, nothing can be left to intendment or implication. *State v. Barnes*, 514.
2. ———: **Carnal Knowledge: Age of Accused.** Where the statute in force at the time declared that "if any person over the age of seventeen years shall have carnal knowledge of any unmarried female of previous chaste character," etc., he shall be guilty of a felony, an information charging that the defendant was "then and there over the age of sixteen years," is fatally defective. To have been a sufficient information it should have specifically alleged that he was at the time over the age of seventeen years. [*Distinguishing State v. Allen*, 267 Mo. 49, and *State v. Volz*, 190 S. W. 307.] *Ib.*

## CRIMINAL LAW—Continued.

3. **Information: Carnal Knowledge: Age of Accused: Cured by Evidence.** Nor was such fatal defect in the information cured by testimony showing that at the time the offense was committed defendant was over seventeen years of age. *State v. Barnes*, 514.
4. ———: ———: ———: **Statute of Jeofails.** Nor is the fatal defect in the information alleging defendant was over the age of sixteen years of age at the time the offense was committed, when the statute requires him to have been over seventeen years of age, cured, after verdict of guilty, by the Statute of Jeofails (Sec. 5115, R. S. 1909). *Ib.*
5. **Evidence: Cross-Examination of Own Witness: New Matter.** Where a witness for defendant, on his cross-examination by the State, has testified to material new matter, the counsel for defendant, in re-examining him as to such new matter, is entitled to a specific answer, and an objection to such re-examination is not to be sustained on the theory that he is defendant's witness and defendant's counsel is not entitled to cross-examine him. The new matter having been brought out by the State, defendant is entitled to have the witness state exactly what defendant said to him, and not his mere conclusion. *Ib.*
6. **Judgment: Carnal Knowledge: Seduction.** Where defendant is charged with statutory rape, a judgment finding him guilty of seduction is erroneous. *Ib.*
7. **Evidence: Other Disconnected Difficulties.** Evidence of quarrels and violent threats by defendant with other parties, prior to the homicide but on the same night, with which deceased was in no wise connected and was not present, is not admissible. *State v. Palmer*, 525.
8. **Venue: How Proven.** Venue in a criminal case may be established in the same way as any other material fact. It may be established by direct testimony, or it may be inferred by the jury from all facts and circumstances in evidence from which the inference may be reasonably drawn. The inference that the homicide was committed in the county in which the information was filed may be drawn from testimony showing that a certain school house was in the county and west of its east county line, and that deceased was shot 650 feet west of the school house. *Ib.*
9. **Information: Shooting at Another.** An information charging a crime under Section 4481, Revised Statutes 1909, is sufficient if it follows the language of the statute, since it embodies all the essential elements of the crime denounced and hence need not be pleaded. *State v. Foster*, 618.
10. ———: ———: **Omission of Word Of.** It is essential that an information charging the crime denounced by Section 4481, Revised Statutes 1909, allege that the act of shooting at another was done "on purpose and of his malice aforethought;" but the omission of the word "of" in the phrase that defendant "did then and there, on purpose and his malice aforethought," etc., was not misleading, did not destroy the sense of the sentence, nor impair the sufficiency of the information. *Ib.*
11. ———: ———: **Did Commit Great Bodily Harm.** An information charging that defendant did shoot another "with intent....him ....to maim and commit great bodily harm" does not, by the use

## CRIMINAL LAW—Continued.

of the words "commit great bodily harm," injure defendant. These words are equivalents of an averment of an intent on defendant's part to inflict an injury permanent in its nature, or more serious than an ordinary battery, but they mean nothing more than the word "maim," and at their worst are only tautological. *Ib.*

12. ———: ———: **Jeofails.** Under the Statute of Jeofails (Sec. 5115, R. S. 1909) no defect or imperfection in an information which does not tend to the prejudice of the substantial rights of appellant can be of any avail on appeal. *Ib.*
13. **Intent: Specific Proof: Inference.** Even if proof of specific intent to maim another is necessary in view of the language of the statute, proof of facts from which the intent may be inferred is sufficient; and such inference may be drawn from proof that defendant shot another with a double-barreled shot gun, loaded with leaden balls and gun powder, on purpose and of malice aforethought, and inflicted wounds calculated to maim. *Ib.*
14. ———: **To Maim: Meaning.** The word "maim" has no technical meaning, but means to inflict some serious bodily injury. Thus classified, there is no occasion to couple the commission of the act of shooting at another with a specific "intent to maim" in order to constitute the offense denounced by the statute (Sec. 4481, R. S. 1909). *Ib.*
15. **Instruction: Omission of Words "Of Malice Aforethought:" Jail Sentence.** The statute (Sec. 4481, R. S. 1909) declared that "every person who shall, on purpose and of his malice aforethought, shoot at another, with intent to maim," etc., shall be punished by imprisonment in the penitentiary not exceeding ten years. The instruction for the State, designed to cover the whole case, omitted the words "with malice aforethought." *Held*, not error, for two reasons: *first*, another statute (Sec. 4904, R. S. 1909) authorized a conviction for a less offense and defendant's punishment was assessed at twelve months' imprisonment in the county jail; and, *second*, errors in instructions concerning a higher degree of the offense than that of which a defendant was convicted are not available to him. *Ib.*
16. **Indictment: Embezzlement: Conversion by Bailee.** Under Section 4552, Revised Statutes 1909, which makes it an offense to convert money or property as a bailee with intent to embezzle it, an indictment charging that at a time mentioned defendant was the bailee of a certain note, describing it, which was owned by a certain other person; that while said note was so held by defendant, he, without the consent of the owner, converted it to his own use; that his intent in so doing was to deprive the owner of the same, and that in the manner aforesaid he did feloniously steal, take and carry away said note, etc., charges every essential element of the crime. *State v. Stevens*, 639.
17. ———: ———: **Ownership.** In an indictment charging that defendant unlawfully as bailee converted a note for \$1500 to his own use, it was alleged that the note, executed by Henry Woods, was "payable to the order of" defendant and was "the right of action, valuable security and property of C. C. Sanders," and was "delivered to and came into possession and under the care of" defendant "as bailee aforesaid, of, for and on behalf of C. C.



## CRIMINAL LAW—Continued.

Sanders." *Held*, that the indictment is not bad because it does not allege that the note was indorsed by defendant to Sanders, but the ownership is sufficiently alleged to be in Sanders, and by the words used is more specific in that respect than it would be had it contained an allegation that the note had been indorsed by defendant to Sanders. *State v. Stevens*, 639.

18. **Indictment: Embezzlement: Description of Note: Secured by Deed of Trust: Interest.** In an indictment for embezzlement as bailee of a note payable when made to defendant, it is not necessary that it allege that the note was secured by a deed of trust, that it bore interest at the rate of eight per cent after maturity, or that it was payable at the office of defendant. Those things constitute matters of description not necessary to be pleaded under the statute, which makes the indictment sufficient if the instrument embezzled is described by any name or designation by which it may be usually known *Ib.*
19. **Objections: General.** Objections to testimony must be specific, and upon an adverse ruling thereon exceptions must be saved; otherwise, they may be disregarded on appeal. *Ib.*
20. **Embezzlement: Variance: Accounting: Intent.** Where the crime charged embezzlement of a note by defendant as bailee, proof that, while the note was in defendant's possession only for the purpose of effecting its sale for the benefit of the owner, defendant pledged it to a bank as collateral to secure the payment of his own debt, is competent to prove the intent with which the conversion was committed, and being competent for that purpose it cannot be ruled to have been offered to establish an accounting, and consequently there was no variance. *Ib.*
21. **Instructions: No Specific Assignment.** A motion for a new trial in a criminal case should contain some definite reference to instructions complained of. Assignments that "the court erred in giving instructions upon the request of the State," that "the court erred in the instructions given of its own motion" and that "the court erred in failing to instruct on all the law of the case," are too indefinite to authorize a review of the instructions on appeal. *Ib.*

## DAMAGES.

1. **Charity: Personal Injury to Patient: Recovery of.** A charitable association is not liable in damages for personal injuries to its patients caused by the negligence of its trustees, servants or employees. The funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted or absorbed by claims arising from the negligence of the trustees or employees. *Nicholas v. Deaconess Home*, 182.
2. ———: ———: ———: **Pay Patient.** The fact that the patient at the hospital of the charitable association was not a charity patient, but paid for all the services rendered by the nurses and for the medicines and supplies furnished by the association, does not entitle her to recover damages for injuries caused by the negligent application by a nurse of carbolic acid, instead of alcohol, to her skin, during the course of a massage prescribed by her physician. *Ib.*

## DAMAGES—Continued.

3. **Covenants: In Deed and Mortgage.** A vendee who secures payment to his vendor of the price of his purchased property by mortgaging back with covenants the estate granted, does not thereby release the vendor from liability on his similar covenants. *Crosby v. Evans*, 202.
4. ———: ———: **Running With the Land.** The covenant of inde-feasible seizure runs with the land when the deed containing it passes any interest to carry the covenant along, the purpose being to enable a remote grantee substantially damaged by the breach to recover his damage; but a purchase-money mortgage or deed of trust, given by a grantee who suffers from his grantor's broken covenant, does not carry back to the grantor the right to sue on the covenants in the original deed or cancel those covenants. *Ib.*
5. ———: ———: **Estoppel.** The grantee in a deed who gives back a deed of trust for the purchase money, containing similar covenants, does not estop himself thereby to sue on the covenants in the deed when a substantial breach occurs which damages him nor create in the grantor a right to sue. *Ib.*
6. ———: **Foreclosure of Deed of Trust by Agreement: Grantee's Right to Damages for Breach.** The grantee, who gave a deed of trust back to secure the purchase money, did not lose his right to recover damages for breach of the covenants contained in his deed, if default in payment and foreclosure sale by the trustee occurred pursuant to a scheme arranged between said mortgagor and said mortgagee that the mortgagee was to buy in order to cure a fault in said mortgagor's title for which the mortgagee was liable on his covenant. *Ib.*
7. ———: ———: **Subsequent Sale.** And where the agreement was that the deed of trust should be foreclosed and the property bought by the mortgagee in order to perfect title in the mortgagor, but the mortgagee, having purchased at the sale, conveyed to a third party, thereby cutting off the mortgagor's title, the mortgagor is entitled to maintain an action for breach of the covenant contained in the deed to him as grantee and recover the amount of purchase money paid by him after his eviction by such subsequent grantee. *Ib.*
8. ———: ———: **Interest.** The mortgagor, in his action for damages for breach of covenants, is entitled to interest on money paid on the purchase price, only from date of eviction, and not from date of the payments, if he was meantime in possession and was not answerable over to any one for rents and profits. *Ib.*
9. **Lease: Liability of Landlord: Negligent Construction.** A landlord, under no obligation, legal or contractual, to make repairs, who nevertheless undertakes to make repairs and negligently creates a defect or danger whereby the tenant, himself in the exercise of due care, is injured, is liable in damages; but if the agreed statement shows no negligence in workmanship or in the selection of materials, or whether the section of the porch railing which gave way when plaintiff's wife leaned against it was at the time in the same condition it stood immediately after being repaired, there can be no recovery. The mere fact that the railing was not replaced by new timber does not prove negligence. *Byers v. Essex Inv. Co.*, 375.
10. **Civil Conspiracy: Buying and Selling: Uniform Commissions: Oppression.** Agreements and conduct by a voluntary association of commission merchants which evidence merely a purpose to enforce and

## DAMAGES—Continued.

maintain fixed and uniform commissions and charges for buying and selling hay on a certain market do not amount to a civil conspiracy; but where the articles of association and by-laws provided that all contracts of a firm having a member of the association were subject to its rules, and plaintiff's partner was a member, and a month after the dissolution of the firm the partner was expelled for failure to pay a fine previously assessed, and the firm itself had not violated the rules or been penalized, the association could not upon the pretext that plaintiff was expelled from membership privileges, bar him from all business intercourse with the members of the association, and thereby oppressively destroy his business of buying and selling hay in the market and in effect drive him from the market; such conduct, under the common law, amounts to a civil conspiracy. *Harelsan v. Tyler*, 383.

11. **At Common Law: Civil Conspiracy: Definition.** A civil conspiracy is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened. *Ib.*
12. **Measure of: Viaduct: Obstruction of Access.** Where a part of the street, two feet wide, between the seven-foot viaduct and plaintiff's property, had not been elevated but remained as it was before the viaduct was constructed in the street, there is no room in the case for an instruction telling the jury that one measure of plaintiff's damage is the amount of money it would cost to raise the surface of plaintiff's property to a level with the present surface of the viaduct. *Witler v. St. Louis*, 457.
13. ———: ———: ———: **Special Benefits.** Where access to plaintiff's property has been completely prevented on the east by the erection of a seven-foot viaduct in the north-and-south adjoining street, and has otherwise been shut off by a ninety-nine-year lease of the property on the south, north and west to a railroad company and the inclosure thereof by a fence, there can be no special benefits to their property by the construction of the viaduct, and the court is not authorized to instruct the jury to take special benefits into consideration as a set off to the damages sustained by them. *Ib.*
14. ———: **Interest: Torts: Instruction: Mutual Error.** Where the instructions asked and given for both plaintiff and defendant told the jury to assess the damages, together "with interest on such sum at the rate of six per cent per annum from such date as from the evidence the jury find said obstruction of access" to plaintiff's property by the construction of a seven-foot viaduct in the adjoining street "was complete," defendant cannot complain that the court instructed the jury to allow interest, even though it be admitted that interest is not allowed in actions *ex delicto*. *Ib.*
15. **Excessive: Contradictory Testimony: Question for Jury.** Where the testimony in regard to the value of plaintiff's property, and the damages thereto caused by the construction of a seven-foot viaduct in the adjoining public street and the complete obstruction of their access thereto, is exceedingly contradictory, but sufficiently substantial, if believed, to support the verdict, and there is nothing in the record to indicate passion or prejudice on the part of the jury, it is the peculiar province of the jury to ascertain

**DAMAGES—Continued.**

and determine the amount of damage, and the court will not interfere with their finding. *Ib.*

16. **Under Federal Act: Contributory Negligence: Instruction.** It is proper to instruct the jury, in a suit for personal injuries brought under the Federal Employers' Liability Act, that the amount of plaintiff's damages may be reduced in the proportion that his own negligence contributed to his injury; and the instruction on the subject in this case is unobjectionable. *Lock v. Burlington Ry. Co.*, 532.

**DANGEROUS MACHINES.** See *Machinery.*

**DEBTOR AND CREDITOR.** See *Assignment.*

**DEFINITIONS.**

1. **Sewer District: Lot.** Section 14 of Article 6 of the Charter of St. Louis relates, not to sewer districts, but to the construction of streets, boulevards and alleys, and the word "lot" used therein is required to be construed "as used in this section," and is not to be understood as a definition of "the lots of ground" and "the lots and parcels of ground" used respectively in Sections 21 and 22, which relate to district sewer and joint sewer districts, according to which assessments of benefits are made by area, and not by front-footage, and wherein the words "lot" and "parcels of ground" are used as equivalent terms. *State ex rel. Boatmen's Bank v. Reynolds*, 1.
2. **Civil Conspiracy: At Common Law.** A civil conspiracy is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened. *Harelsan v. Tyler*, 383.

**DEMURRER.**

1. **Admissions.** A general demurrer to a petition admits all facts well pleaded, but it does not admit allegations which are mere conclusions of the pleader. *Harelsan v. Tyler*, 383.
2. **Refusal to Plead Further: Judgment: Appellate Practice.** Where defendants interposed a general demurrer to the petition, which the court sustained, and, upon plaintiff's declining to plead further, entered judgment on the demurrer, the only question for consideration upon an appeal by plaintiff is the sufficiency of the petition, and if it states a cause of action, either under the statute or at common law, the judgment will be reversed, but otherwise it will be affirmed. *Ib.*

**DISMISSAL.**

**Assignment: Pending Stipulation for Judgment.** Where a cause of action is pending on a stipulation for judgment and is assigned by the plaintiffs, together with all their interests in the property in suit, the court should not permit plaintiffs, upon the payment of costs, to dismiss the action, without the consent of the assignee. *Norton v. Reed*, 482.

## DIVORCE.

1. **Appellate Jurisdiction: Usurpation.** Under a constitutional government the acts of a court not within its powers prescribed by the organic law are usurpations, and when done by a court of last resort may become a grave menace. *Vordick v. Vordick*, 279.
2. ———: **Other Issues.** Divorce *per se* is not one of the cases named in the Constitution in which an appeal lies to the Supreme Court, and if it has jurisdiction to review a judgment for divorce on its merits it must be because it involves some issue which brings it within the enumeration of specific cases wherein it is given appellate jurisdiction. *Ib.*
3. ———: **Alimony: Amount in Dispute: How Ascertained.** Where the trial court granted the wife a divorce and alimony in the sum of \$5,000, and the only possible ground upon which the Supreme Court has jurisdiction of her appeal is that the amount in dispute exceeds \$7,500, the fact that it has jurisdiction on that ground must affirmatively appear from the record made in the trial court; and if the petition does not allege any definite amount she is entitled to recover, either as alimony or attorney's fees, the entire record should be examined, to determine what is the amount in dispute. *Ib.*
4. ———: ———: ———: **Inadequate Award: Social Station.** Where the plaintiff in her petition in the divorce case did not allege the amount she was entitled to recover as alimony or attorney's fees and its prayer was that she be adjudged such alimony as in the nature of the case and the circumstances of the parties may be right and proper, and in her motion for a new trial she complained that the amount of alimony awarded her was inadequate and less than she was entitled to under the law and the evidence and further that she should have been adjudged an amount sufficient to yield her an income that would support her according to the station in life of herself and defendant, the amount in dispute on her appeal is the difference between the \$5,000 adjudged to her and either (a) the adequate amount to which she is entitled under the law and the evidence, or (b) an amount that would yield an income sufficient to support her according to her station in life; and unless it affirmatively appears from the entire record that the amount she was entitled to recover for one or the other of these reasons, is an amount in excess of \$12,500, the Supreme Court has no jurisdiction of her appeal—there being no other ground on which jurisdiction is invested in said court except the one possible ground that the amount in dispute exceeds \$7,500. But she could have fixed appellate jurisdiction in the Supreme Court, by claiming in her petition an amount in excess of \$7,500 over and above the amount awarded her by the trial court, unless the allegations made it apparent that such claim was fictitious and colorable only. *Ib.*
5. **Dower After Decree for Wife.** The wife's inchoate dower in her husband's real estate is unaffected by a decree granting her alone a divorce and awarding her alimony in a named sum of money, which is not adjudged to be in lieu of dower. *Ib.*

## DOWER.

1. **Divorce: After Decree for Wife.** The wife's inchoate dower in her husband's real estate is unaffected by a decree granting her

**DOWER—Continued.**

alone a divorce and awarding her alimony in a named sum of money, which is not adjudged to be in lieu of dower. *Vordick v. Vordick*, 279.

2. **Will: Life Estate: Homestead and Quarantine.** If it be contended that by the word "homestead" used in the will declaring "my homestead shall be left intact as long as my wife lives" the testator had in mind the statutory homestead given by Section 6708, Revised Statutes 1909, whereby the widow, there being no minor children, is vested with a homestead during her life or widowhood, it may as well be contended that he had in mind Section 366, which provides that a widow, until dower be assigned, may remain in and enjoy the mansion house. *Wetzel v. Hecht*, 610.
3. ———: ———: **Quarantine and Assignment of Dower.** Under Section 366, Revised Statutes 1909, which provides that a widow may remain in and enjoy the mansion house until dower be assigned, her quarantine interest is not lost until dower is assigned, and by virtue of that interest she may maintain or defeat ejectment, or she may convey it and her grantee acquires the same right. And if the will declared "my homestead shall be left intact so long as my wife lives," her dower cannot be assigned during her life, and consequently her quarantine right must remain undisturbed as long as she lives, for otherwise the homestead could not remain "intact." By the words used the testator enlarged the estate which the statute gave his widow, and removed the contingency upon which it would terminate on her marriage, and the result is a life estate, by implication. *Ib.*

**EJECTMENT.**

1. **Against Grantor: Assignment: New Parties: Stipulation for Judgment.** The purchaser from the defendant in ejectment, by deed executed one day before suit is filed but not recorded until one day after, is, under the statute (Sec. 1732, R. S. 1909), entitled to be joined as codefendant and to defend his title, or to have it defended in the name of the original defendants. And if a stipulation is signed by the attorney for the original defendants that the action shall remain on the docket and abide the result in another pending suit, he and his grantee are bound by the stipulation. *Norton v. Reed*, 482.
2. **Limitations: Quietting Title: Demand for Possession: By Count in Ejectment.** By a separate count in ejectment in their answer or cross-bill to plaintiff's petition to determine title, or by any other sufficient allegations of facts for affirmative relief, in which they plead ouster, assert their right to possession and pray that they be restored to possession, made within ten years, defendants can arrest the running of the ten-year Statute of Limitations (Sec. 1879, R. S. 1909), but if no such possessory right is asserted in the answer or cross-bill, and it contains no denial of plaintiff's allegation, in her amended petition, of adverse and sole possession and claim of ownership for ten years, including the years which have expired since her suit was instituted, and the facts establish such possession in her, the running of the statute against defendants is not arrested. *Peper v. Union Trust Co.*, 562.

**EMBEZZLEMENT.**

**Variance: Accounting: Intent.** Where the crime charged embezzlement of a note by defendant as bailee, proof that, while the note was in defendant's possession only for the purpose of effecting its sale for the benefit of the owner, defendant pledged it to a bank as collateral to secure the payment of his own debt, is competent to prove the intent with which the conversion was committed, and being competent for that purpose it cannot be ruled to have been offered to establish an accounting and consequently there was no variance. *State v. Stevens*, 639.

**EMPLOYMENT.**

**Professional Services: Mechano-Therapist: No License.** A mechano-therapist, having no license to practice, cannot recover, for his services as "a practitioner of drugless healing" and of "the chiropractic method." [Approving and adopting opinion of Springfield Court of Appeals in *O'Bannon v. Wydick*, 197 S. W. Rep. 432.] *O'Bannon v. Wydick*, 478.

**EQUITY.**

1. ———: **Sale of Properties: Assignment, Sale or Release: Substantive Wrong.** It matters not by what name the transaction by which one corporation transferred all its assets to another is characterized, whether as a sale or assignment or the release of an existing lease, if its effect was to turn over, without consideration, a trust fund held by the one to pay its debts, to the other, and such transferee took the assets, knowing that they far exceeded the debts assumed, and with notice of the unpaid debts of the other, equity will hold the transfer void as to the existing creditors. Equity looks to substance and not form, and will not sanction an unconscionable result merely because it has been brought about by means which simulate legality. [Per *WILLIAMSON, J.*, with whom *WALKER, C. J.*, and *WILLIAMS, J.*, concur.] *Johnson v. United Rys.*, 90.
2. **Deed: Mutual Mistake: Intention: Reformation.** A deed is presumed to express the final agreements of the parties only when it in fact expresses their intention. Where the intention of the parties is not expressed, but the deed recites mutual mistakes, a court of equity can reform it to express their intention. *Maze v. Boehm*, 507.
3. ———: ———: **Character of Proof.** The burden of proof is on the party asserting that the deed did not express the intention of the parties, to establish the mistake and its mutuality, but such proof need not reach the high standard of beyond a reasonable doubt, but is sufficient if cogent, clear and convincing. *Ib.*

**ESTATE BY ENTIRETIES.**

1. **Cotenants Upon Divorce Decree.** Residence property, bought by the husband and by his bounty conveyed to him and his wife as tenants by the entirety, by virtue of a decree of divorce in her favor becomes the property of the two equally as tenants in common. *Vordick v. Vordick*, 279.
2. **Deed to Husband and Wife: Separate Estates: Intention: Parenthetical Clause.** The deed made in 1867 recited that the grantors,

## ESTATE BY ENTRIES—Continued.

in "consideration of the regard and affection we have for our daughter Fannie E. Finley and of the payment of eight hundred dollars by William Finley," do "hereby convey and sell to said Fannie and William two hundred and fifty acres.....most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to Fannie." *Held*, that the granting clause is a clear and unambiguous conveyance to Fannie and William, and is not limited by the last parenthetical words, which are of doubtful and uncertain meaning and application.

*Held*, by WILLIAMSON, J., dissenting, with whom BLAIR and GOODE, JJ., concur, that if an estate by the entirety had been intended the intention would have been expressed in some other words than the mere granting clause, and that the instrument as a whole declared an express purpose of a sale of fifty acres to William and a gift of two hundred to Fannie, and that purpose is strengthened by the order in which the grantees are named, in that the granting clause says that the grantors "convey and sell to Fannie and William," which in effect means that they convey to Fannie and sell to William. *Welch v. Finley*, 684.

3. **No Several Tract: Change in Law.** That the clear words of the granting clause were not restricted by the ambiguous subsequent clause is reinforced by two other facts: *first*, the deed contains no word or phrase indicating that the grantors intended to convey in severalty to their daughter and her husband distinct parcels; and, *second*, at the time the deed was made (1867) the notion of unity of property and person of husband and wife was firmly fixed in the popular mind and in the law, and it was not unusual for a father, when he gave real estate as an advancement to a daughter, to deed it to both.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that a gift, by deed, to the daughter alone, had no tendency to divert the title from the descendants of the grantors, and to construe the deed in judgment as a conveyance of an estate by the entirety to the grantors' daughter and her husband, and the vesting of the title first in him by her death and then in his collateral kindred upon his death is to vest the title in strangers to the grantors' blood, which is a result in no wise contemplated by the terms used in the deed. *Ib*.

## ESTOPPEL.

1. **Street Railway Track: Abandonment.** The question of estoppel in favor of a city, in consideration of conditions imposed upon a street railway company at the time a franchise ordinance to occupy the streets was enacted, does not arise in a case in which the public, represented by the Public Service Commission, is a substantial party. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.
2. **Breach of Covenant: Damages.** The grantee in a deed who gives back a deed of trust for the purchase money, containing similar covenants, does not estop himself thereby to sue on the covenants in the deed when a substantial breach occurs which damages him, nor create in the grantor a right to sue. *Crosby v. Evans*, 202.



**ESTOPPEL—Continued.**

3. **Contribution: Administration: Payment of Heir's Debts: Final Settlement.** Heirs who assist the administratrix to pay estate debts, whereby she is enabled to make final settlement and be discharged, are not estopped to compel contribution, to the extent of a debtor heir's interest in estate lands conveyed by him to pay his individual debts. The grantee in such conveyance is not an innocent purchaser, a final settlement only indicates that there are no unsatisfied estate creditors, and such assistance is not voluntary. *Ridings v. Bank*, 288.

**HUSBAND AND WIFE.**

1. **Divorce: Dower After Decree for Wife.** The wife's inchoate dower in her husband's real estate is unaffected by a decree granting her alone a divorce and awarding her alimony in a named sum of money, which is not adjudged to be in lieu of dower. *Vordick v. Vordick*, 279.
2. **Estate by the Entirety: Cotenants Upon Divorce Decree.** Residence property, bought by the husband and by his bounty conveyed to him and his wife as tenants by the entirety, by virtue of a decree of divorce in her favor becomes the property of the two equally as tenants in common. *Ib.*
3. **Widower's Share: Note to Deceased Wife: Estoppel.** When the appointment of an administrator upon a deceased wife's estate is legally dispensed with, a note for \$500 payable to her, being her sole property, becomes the absolute property of her husband as her widower; it could not have been given away by her, nor willed away, nor taken by her creditors. If its payment is to be avoided in a suit thereon by her widower, the maker must either establish payment prior to her death, or plead and establish such an application, with the husband's acquiescence, of an equal amount of money after her death, as amounts to an estoppel, such as the payment of her funeral expenses. *Parsons v. Harvey*, 413.

See, also, *Estate by Entireties*.

**IDENTITY OF NAME AND PERSON.** See *Name*.

**INDICTMENT AND INFORMATION.**

1. **Sufficiency: All Words of Statute.** The constitution declares that in criminal prosecutions the accused shall have the right to "demand the nature and cause of the accusation," and that means that the information shall specifically bring the accused within all the material words of the statute he is charged with having violated. In criminal pleading it is an inflexible rule that, in the indictment or information for a felony, nothing can be left to intendment or implication. *State v. Barnes*, 514.
2. **Carnal Knowledge: Age of Accused.** Where the statute in force at the time declared that "if any person over the age of seventeen years shall have carnal knowledge of any unmarried female of previous chaste character," etc., he shall be guilty of a felony, an information charging that the defendant was "then and there over the age of sixteen years," is fatally defective. To have been a sufficient information it should have specifically alleged that he was at the time over the age of seventeen years. [Distinguish-

## INDICTMENT AND INFORMATION—Continued.

- ing State v. Allen, 267 Mo. 49, and State v. Volz, 190 S. W. 367.]  
Ib.
3. ———: ———: **Cured by Evidence.** Nor was such fatal defect in the information cured by testimony showing that at the time the offense was committed defendant was over seventeen years of age, Ib.
  4. ———: ———: **Statute of Jeofails.** Nor is the fatal defect in the information alleging defendant was over the age of sixteen years at the time the offense was committed, when the statute requires him to have been over seventeen years of age, cured, after verdict of guilty, by the Statute of Jeofails (Sec. 5115, R. S. 1909). Ib.
  5. **Shooting at Another.** An information charging a crime under Section 4481, Revised Statutes 1909, is sufficient if it follows the language of the statute, since it embodies all the essential elements of the crime denounced and hence need not be pleaded. State v. Foster, 618.
  6. ———: **Omission of Word Of.** It is essential that an information charging the crime denounced by Section 4481, Revised Statutes 1909, allege that the act of shooting at another was done "on purpose and of his malice aforethought;" but the omission of the word "of" in the phrase that defendant "did then and there, on purpose and his malice aforethought," etc., was not misleading, did not destroy the sense of the sentence, nor impair the sufficiency of the information. Ib.
  7. ———: **Did Commit Great Bodily Harm.** An information charging that defendant did shoot another "with intent....him....to maim and commit great bodily harm" does not, by the use of the words "commit great bodily harm," injure defendant. These words are equivalents of an averment of an intent on defendant's part to inflict an injury permanent in its nature, or more serious than an ordinary battery, but they mean nothing more than the word "maim," and at their worst are only tautological. Ib.
  8. ———: **Jeofails.** Under the Statute of Jeofails (Sec. 5115, R. S. 1909) no defect or imperfection in an information which does not tend to the prejudice of the substantial rights of appellant can be of any avail on appeal. Ib.
  9. **Embezzlement: Conversion by Bailee.** Under Section 4552, Revised Statutes 1909, which makes it an offense to convert money or property as a bailee with intent to embezzle it, an indictment charging that at a time mentioned defendant was the bailee of a certain note, describing it, which was owned by a certain other person; that while said note was so held by defendant, he, without the consent of the owner, converted it to his own use; that his intent in so doing was to deprive the owner of the same, and that in the manner aforesaid he did feloniously steal, take and carry away said note, etc., charges every essential element of the crime State v. Stevens, 639.
  10. ———: **Ownership.** In an indictment charging that defendant unlawfully as bailee converted a note for \$1500 to his own use, it was alleged that the note, executed by Henry Woods, was

## INDICTMENT AND INFORMATION—Continued.

"payable to the order of" defendant and was "the right of action, valuable security and property of C. C. Sanders," and was "delivered to and came into possession and under the care of" defendant "as bailee aforesaid, of, for and on behalf of C. C. Sanders." *Held*, that the indictment is not bad because it does not allege that the note was indorsed by defendant to Sanders, but the ownership is sufficiently alleged to be in Sanders, and by the words used is more specific in that respect than it would be had it contained an allegation that the note had been indorsed by defendant to Sanders. *State v. Stevens*, 639.

11. **Embezzlement: Description of Note: Secured by Deed of Trust: Interest.** In an indictment for embezzlement as bailee of a note payable when made to defendant, it is not necessary that it allege that the note was secured by a deed of trust, that it bore interest at the rate of eight per cent after maturity, or that it was payable at the office of defendant. Those things constitute matters of description not necessary to be pleaded under the statute, which makes the indictment sufficient if the instrument embezzled is described by any name or designation by which it may be usually known. *Ib.*

## INSTRUCTIONS.

1. **Negligence: Not Supported by Evidence.** Specific defects in a machine, charged in the petition to be a cause of plaintiff's injury, which are not established by any substantial evidence, should not by the instructions be submitted to the jury as a basis for plaintiff's right to recover. *Kuhn v. Lusk*, 324.
2. ———: ———: **Recovery on Different Specifications.** If the jury are by the instructions permitted to find for plaintiff on either of two specifications of negligence, and as to one of them the evidence is insufficient to support a finding, a verdict and judgment for him must be set aside and the cause retried. *Ib.*
3. ———: **No Itemization of Specific Acts.** An instruction for plaintiff, which not only directs the jury to find for him if the specific acts of negligence declared on were committed, but also if the driver of defendant's automobile truck operated and propelled it in a manner which, under all the circumstances mentioned in evidence, was not careful and prudent, is erroneous. A defendant charged with a negligent tort has the right to be informed what particular negligent acts plaintiff relies on, and the instruction should require the jury to find one or more of the specific acts which the evidence tends to establish. *Ballman v. Teaming Co.*, 342.
4. **Fraud and Deceit: Measure of Damages.** Where one person makes a purchase for another, or where one of two or more joint purchasers conducts a joint purchase, and falsely represents that the price is actually greater than what is actually paid for the property, the measure of damages is the difference between the amount actually paid by the party defrauded and the true purchase price. So where defendants, in an endeavor to induce plaintiffs to join with them to purchase land, represented that the property was worth \$3000 per acre, whereas it was actually bought by defendants for less than \$1500 per acre, the court properly refused an instruction directing the jury to return a verdict for defendants if at the time plaintiffs bought a half interest

## INSTRUCTIONS—Continued.

the property was reasonably worth \$3000 per acre; but properly instructed the jury to assess plaintiffs' damages, if they found for plaintiffs, at the difference between what plaintiffs paid defendants for a half interest and one-half the amount defendants actually paid to the grantor for the entire tract. *Thompson v. Lyons*, 430.

5. **Measure of Damages: Interest: Torts: Mutual Error.** Where the instructions asked and given for both plaintiff and defendant told the jury to assess the damages, together "with interest on such sum at the rate of six per cent per annum from such date as from the evidence the jury find said obstruction of access" to plaintiffs' property by the construction of a seven-foot viaduct in the adjoining street "was complete," defendant cannot complain that the court instructed the jury to allow interest, even though it be admitted that interest is not allowed in actions *ex delicto*. *Witler v. St. Louis*, 457.
6. **Damages: Under Federal Act: Contributory Negligence.** It is proper to instruct the jury, in a suit for personal injuries brought under the Federal Employers' Liability Act, that the amount of plaintiff's damages may be reduced in the proportion that his own negligence contributed to his injury; and the instruction on the subject in this case is unobjectionable. *Lock v. C., B. & Q.*, 532.
7. **Identity of Name: Identity of Person.** Identity of person is to be presumed from identity of name. But the presumption may be overcome by credible evidence. The presumption only establishes a prima-facie case. The jury, or the court sitting as a jury, may believe or disbelieve such evidence; if believed, the presumption fails; if disbelieved, the presumption will authorize a verdict. *Brooks v. Roberts*, 551.
8. ———: ———: **Reasonable Doubt.** An instruction on the presumption of identity of person arising from identity of name should not require the trier of the facts to find the identity of person beyond a reasonable doubt, or otherwise ignore the presumption. The term "reasonable doubt" or similar expressions have no place in instructions in a civil case. *Ib.*
9. **Erroneous: Given by Court to Itself.** An erroneous instruction given by the court sitting as a jury to try the facts will work a reversal. In such case, the erroneous instruction in a law case is just as fatal as if the issues had been submitted to a jury and such instruction had been given to them as their guide. *Ib.*
10. **Omission of Words "Of Malice Aforethought": Jail Sentence.** The statute (Sec. 4481, R. S. 1909) declared that "every person who shall, on purpose and of his malice aforethought, shoot at another, with intent to maim," etc. shall be punished by imprisonment in the penitentiary not exceeding ten years. The instruction for the State, designed to cover the whole case, omitted the words "with malice aforethought." *Held*, not error, for two reasons: *first*, another statute (Sec. 4904, R. S. 1909) authorized a conviction for a less offense and defendant's punishment was assessed at twelve months' imprisonment in the county jail; and, *second*, errors in instructions concerning a higher degree of the offense than that of which a defendant was convicted are not available to him. *State v. Foster*, 618.  
281 Mo. Sup.—49.

## INSTRUCTIONS—Continued.

11. **No Specific Assignment.** A motion for a new trial in a criminal case should contain some definite reference to instructions complained of. Assignments that "the court erred in giving instructions upon the request of the State," that "the court erred in the instructions given of its own motion" and that "the court erred in failing to instruct on all the law of the case," are too indefinite to authorize a review of the instructions on appeal. *State v. Stevens*, 639.
12. **Injuries at Other Times and Places.** The trial court did not commit prejudicial error in instructing the jury that the mere fact that plaintiff at some time may have sustained broken ribs and other injuries was not proof that he was injured at the time and in the manner asserted by him, if there was direct testimony that he was neither on nor within several feet of defendant's car at the time he claims to have been injured and he did not call a doctor or notify defendant for four months thereafter. *Ulrich v. C. B. & Q. Ry. Co.*, 697.
13. **Conflicting.** An instruction authorizing the jury to find for defendant if they believe "from all the facts and circumstances in the case" that plaintiff had not received any injury is not in conflict with another for defendant requiring plaintiff to make out his case "by the greater weight of the credible evidence in the case." They do not set up different standards of the weight of evidence requisite to warrant a finding, but the one places the burden on plaintiff and the other presents the matter from the point of view of defendant, on whom rests no such burden. *Ib.*
14. **Expert Testimony: No Injury.** Error in an instruction concerning expert testimony is not prejudicial, where the testimony has reference to the character, extent and permanency of plaintiff's injury and spends its force on the issue as to the amount of damage, and the jury finds that he was not injured by defendant at all. Besides, the instruction here complained of was, in substantially the same form, approved in *Hoyberg v. Henske*, 153 Mo. 1. c. 75, and numerous later cases. *Ib.*
15. **To Disregard Testimony.** An instruction for defendant telling the jury that they were authorized to disregard testimony, if any, opposed to obvious physical facts or in contradiction of the common knowledge and experience of mankind, was not prejudicial under the facts of this case, where both court and jury had full opportunity to observe whether plaintiff's actual physical condition and conduct accorded with his testimony. *Ib.*

## INTEREST.

1. **Damages: For Breach of Covenant.** The mortgagor, in his action for damages for breach of covenants, is entitled to interest on money paid on the purchase price, only from date of eviction, and not from date of the payments, if he was meantime in possession and was not answerable over to any one for rents and profits. *Crosby v. Evans*, 202.
2. ———: **Torts: Instruction: Mutual Error.** Where the instructions asked and given for both plaintiff and defendant told the jury to assess the damages, together "with interest on such sum at the rate of six per cent per annum from such date as from

## INTEREST—Continued.

the evidence the jury find said obstruction of access" to plaintiffs' property by the construction of a seven-foot viaduct in the adjoining street "was complete," defendant cannot complain that the court instructed the jury to allow interest, even though it be admitted that interest is not allowed in actions *ex delicto*. *Witler v. St. Louis*, 457.

## JUDGMENT.

1. **Jurisdiction.** No judgment of a state court can have any validity unless supported by a personal notice to the defendant, served within the state, or by his voluntary appearance and submission to the jurisdiction, except in so far as it may be directed against property actually in the state and therefore subject to its jurisdiction. *Palmer v. Bank*, 72.
2. ———: **In Rem.** If the plaintiff at the time the garnishment judgment rendered against him and the defendant bank by the court of Tennessee had never been within that state, did not enter his appearance, and the money, of which it is claimed the Tennessee court acquired jurisdiction *in rem*, was deposited in the defendant bank in Missouri, payable to plaintiff upon demand, he was not bound by the judgment of the Tennessee court impounding the money for the use of his Tennessee creditor; for that court, neither by statute nor otherwise, could acquire jurisdiction over him of the *res*. *Ib.*
3. **Sale of Properties: Unpaid Judgment: Amount Paid by Assignee: Clean Hands.** If the amount paid by the assignee of unpaid judgments is the amount that the judgment debtor cannot pay and his transferee refuses to pay, the assignee has a justiciable claim against the transferee, and is not chargeable with coming into court with unclean hands for that he paid only one-third of their face value. [Per WILLIAMSON, J.] *Johnson v. United Rys.*, 90.
4. **Quietting Title: Under Old Section 650: Effect of Judgment.** Section 650, Revised Statutes 1899, contained no authority for a judgment affecting the title of persons not parties or privies. It did not authorize a judgment transferring the title of defendants to plaintiff; all that a decree in a suit under it could do, if properly brought, was to debar and estop the defendants, whether unknown heirs or devisees of a supposed record owner, and those in privity and claiming under them by subsequent deed or right, from setting up, as against the plaintiff and those claiming under her, the title in judgment in that suit. And especially is that the effect of such judgment, if the petition did not pray that defendants' title be transferred to plaintiff. All such a suit, under that statute, could decide was that the defendants had no title and that plaintiff had full title; the judgment did not vest in plaintiff a record title of the ancestor of the unknown heirs. *Hayti Devlp. Co. v. Clayton*, 221.
5. **Assignment: Ejectment Against Grantor: Stipulation for Judgment.** The purchaser from the defendant in ejectment, by deed executed one day before suit is filed but not recorded until one day after, is, under the statute (Sec. 1732. R. S. 1909), entitled to be joined as codefendant and to defend his title, or to have it defended in the name of the original defendants. And if a stipulation is

## JUDGMENT—Continued.

signed by the attorney for the original defendants that the action shall remain on the docket and abide the result in another pending suit, he and his grantee are bound by the stipulation. *Norton v. Reed*, 482.

6. **Carnal Knowledge: Seduction.** Where defendant is charged with statutory rape, a judgment finding him guilty of seduction is erroneous. *State v. Barnes*, 514.

## JURIES AND JURORS.

**Irregular Summons.** An irregularity in summoning talesmen for the jury, no prejudice appearing, is not reversible error. *Crosby v. Evans*, 202.

## JURISDICTION.

1. **Suit in Another State: Attachment: Notice by Publication: Main and Ancillary Issue.** A Tennessee grain dealer deposited money in a Missouri bank to guarantee a Missouri farmer that his drafts for corn shipped to the grain dealer would be paid. The farmer shipped a carload of corn and took the bill of lading to the bank, and was for the first time informed that the grain dealer had drawn out the guaranty fund. Expressing dissatisfaction, he drew his draft on the grain dealer, which was dishonored by the drawee and returned to the bank. The farmer threatened to sue the bank for surrendering his security without notice, and to settle the matter the bank purchased the corn, placing the amount of the draft to the farmer's credit, receiving its title by an assignment of the bill of lading, and sent it to a Tennessee factor, who sold the corn for the bank, receiving the money therefor. The grain dealer, claiming that he had sustained damages in a large sum on account of the poor quality of four previous carloads of corn purchased from the farmer, brought suit in Tennessee, by garnishment, against the farmer, the bank and the factor, giving notice to the farmer and bank by publication. The bank entered its general appearance, and the factor paid the money into court, to be disposed of according to its decree. Notwithstanding the farmer made no appearance, the court found he was indebted to the grain dealer in a large sum, and adjudged that the grain dealer was entitled to the fund deposited in court by the factor. Thereupon the farmer sued the bank in a Missouri court for the amount of the draft deposited to his credit when the bill of lading was assigned to the bank. *Held*, that the judgment of the Tennessee court impounding the fund was only ancillary to the principal issue, whether the farmer was indebted to the grain dealer, and as he had no property in Tennessee the validity of that judgment depends upon whether the Tennessee court acquired jurisdiction to render a judgment against him on the principal issue. *Palmer v. Bank*, 72.
2. ———: ———: **Appearance: Waiver: Constitutional Question.** Since the defendant bank appeared generally in the Tennessee court, did not object to the jurisdiction of the court over the principal defendant in the attachment proceeding, did not assert the unconstitutionality of the Tennessee statute which authorized constructive service upon both, and, without any appearance whatever by the non-resident principal defendant, went to trial on the merits of the case, and was defeated, it will not now be permitted to deny

## JURISDICTION—Continued.

the validity of the Tennessee judgment awarding a fund belonging to it to the plaintiff in that case as a creditor of the principal defendant therein; but in a suit said principal defendant against said bank, in a Missouri court, to recover money placed to his credit in the bank, the question whether the adjudication by the Tennessee court that the plaintiff was indebted to the plaintiff in that attachment suit is binding upon the plaintiff in this, or was void for lack of jurisdiction, is for determination. *Ib.*

3. ———: ———: **Action in Rem.** No judgment of a state court can have any validity unless supported by a personal notice to the defendant, served within the state, or by his voluntary appearance and submission to the jurisdiction, except in so far as it may be directed against property actually in the state and therefore subject to its jurisdiction. *Ib.*
4. ———: ———: ———: **Garnishment in Another State.** If the plaintiff at the time the garnishment judgment rendered against him and the defendant bank by the court of Tennessee had never been within that state, did not enter his appearance, and the money of which it is claimed the Tennessee court acquired jurisdiction *in rem*, was deposited in the defendant bank in Missouri, payable to plaintiff upon demand, he was not bound by the judgment of the Tennessee court impounding the money for the use of his Tennessee creditor; for that court, neither by statute nor otherwise, could acquire jurisdiction over him or the *res*. *Ib.*
5. **Not Contested by Either Party.** Notwithstanding neither party has questioned the jurisdiction of a court, the first question to be raised and decided by any court in any case is whether it has jurisdiction in point of fact. *Bealmer v. Fire Ins. Co.*, 495.
6. **Venue: Railroad.** A railroad company, whose line of road runs into only one county of the State and has an office or agent in no other, can be sued only in such county. *State ex rel. Hines v. Calhoun*, 583.
7. ———: **Director-General of Railroads: Agent.** The usual and customary business of a railroad company consists in the receipt of freight and passengers at various points on its line, the transportation of them thereon, their delivery at other points thereon, the issuance of bills of lading, the sale of tickets, and the keeping of books and accounts of the company relating to such transactions; and the Director-General of Railroads, appointed under an act of Congress directing the President to take charge of, operate and control all railroads, is not such an agent in a county in which the railroad company which has caused plaintiff's injury has no place of business and into which its line of road does not run, and the circuit court of such county has no jurisdiction over the person of the Director-General, although he is found in the county and summons is served upon him therein. Whether or not the action for damages be grounded on the Employers' Liability Act, his duties and liabilities are just as broad territorially as were those of the railroad company before he took charge of its properties. If the railroad company could not have been sued in a county prior to that time, he cannot be. *Ib.*



## JURISDICTION—Continued.

8. **Venue: Railroad: General Orders 18-A and 18-B.** General Orders 18-A and 18-B of the Director-General of Railroads, providing that suits against carriers while under Federal control must be brought in the county or district where plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, cannot be construed to oust a state court of jurisdiction of the subject-matter of an action over which the laws of the State give it jurisdiction; but if the railroad company, whose lines are being operated by the Director-General, has a line of road in a certain county in this State, he can be sued in such county, provided he can be found there, though the service of summons would have to be made under Section 1751, and not under Section 1754, Revised Statutes 1909. *State ex rel. Hines v. Calhoun*, 583.

## LACHES.

1. **In Action at Law.** The defense of laches is only applied to defeat a claim for equitable relief. Laches is not a bar to a claim made under a legal title. *Hayti Devlp. Co. v. Clayton*, 221.
2. **Action at Law: Suit to Quiet Title.** Laches is no defense to an action at law. Where the petition and answer are not set out, but abstracted by appellant, and it is stated in this abstract that laches was interposed by the answer as a defense, but both this abstract and the statement of respondent also say that the petition was an ordinary action under the statute to quiet title, and the record shows the case was tried as one at law, the case will be so treated on appeal, and the finding of the judge sitting as a jury will be binding, for such a petition states a cause of action at law, and not in equity. *Brooks v. Roberts*, 551.
3. ———: ———: **Taxes.** The mere non-payment of taxes on land does not show laches. *Ib.*

## LANDLORD AND TENANT.

1. **Lease: Liability of Landlord: Negligent Construction.** A landlord under no obligation, legal or contractual, to make repairs, who nevertheless undertakes to make repairs and negligently creates a defect or danger whereby the tenant, himself in the exercise of due care, is injured, is liable in damages; but if the agreed statement shows no negligence in workmanship or in the selection of materials, or whether the section of the porch railing which gave way when plaintiff's wife leaned against it was at the time in the same condition it stood immediately after being repaired, there can be no recovery. The mere fact that the railing was not replaced by new timber does not prove negligence. *Byers v. Essex Inv. Co.*, 375.
2. ———: ———: ———: **Res Ipsa Loquitur: Agreed Statement.** If the petition pleads specific negligence, reliance upon the doctrine of *res ipsa loquitur* is thereby excluded; and a statement of facts agreed upon for the purpose of obviating the introduction of evidence does not alter the rule, for such an agreed statement is not an agreed case under the statute or at common law. *Ib.*
3. ———: ———: ———: ———: **Application to Situation.** The basis of the presumption inherent in the rule of *res ipsa loquitur* is the doctrine of probabilities. There is no such probability that the break-

## LANDLORD AND TENANT—Continued.

ing of a wooden porch railing, which gave way when plaintiff's wife leaned against it, was due to negligence in repairing it ten months previously, as to justify an application of the rule, there being no showing that the part which gave way was repaired. *Ib.*

4. ———: ———: ———: ———: **Peculiar Knowledge: Voluntary Act.** The rule of *res ipsa loquitur* as establishing negligence on the part of the landlord does not apply where the cause of the fall of plaintiff's wife from the porch was not peculiarly within the knowledge of the landlord and peculiarly beyond that of plaintiff. Nor does it apply if the voluntary act of plaintiff's wife was immediately connected with her fall. *Ib.*

## LANDS AND LAND TITLES.

1. **Deed as Mortgage: Right of Redemption: Limitations.** A conveyance in the form of a warranty deed, made and accepted as security for a debt, is a mortgage, and leaves in the mortgagor an equity of redemption which cannot be clogged or abridged by a stipulation in it that redemption must occur within ten years. *Carson v. Lee*, 166.
2. ———: **The Word Redeem: Intention.** Whether or not a deed otherwise absolute, is to be construed to be a mortgage, is not to be determined by the use of the word "redeem" used in a stipulation clause therein by which the grantee agrees that the grantors "may at any time within ten years redeem said land" and upon the payment of a named sum of money he "will reconvey" to them, for though the word is appropriate to express an equitable right of redemption, it is not of fixed meaning and the nature of the instrument, whether mortgage or conditional sale, is not determined by its use, but by the intention of both parties at the time it was made. If made to be a mortgage it retains the character then intended; otherwise, a deed absolute on its face, with an agreement to reconvey upon conditions, cannot be construed to be a mortgage, but is a conditional sale or deed of purchase. *Ib.*
3. ———: **Intention: Extraneous Evidence.** The terms of a deed may show so clearly on its face the real understanding of the parties, that no aid from extraneous circumstances is required or permitted to interpret it. On the other hand, it may leave the question whether it is a mortgage or deed of purchase in such doubt, that extraneous evidence is necessary to determine its character, and then such evidence is competent. *Ib.*
4. ———: **Debt.** A condition indispensable to a holding that a warranty deed was intended to be a mortgage is that there must have been a debt to secure, or some liability against which the grantee is to be guarded; for the purpose of a mortgage is security. *Ib.*
5. ———: ———: **To Pay Debts.** Where the grantee was surety for one of the grantors on notes to the amount of a few hundred dollars, but neither was otherwise indebted to him, the notes were paid out of the \$4000 named as the consideration for the deed, as was an existing mortgage for \$800, and no assignment of any of the notes was made to the grantee, and there is no evidence that the balance of the consideration was advanced as a loan to either grantor, and no loan evidencing a debt

## LANDS AND LAND TITLES—Continued.

was taken and no debt was mentioned in the deed, there was no debt secured by the instrument, and to hold there would be to run counter to all ordinary experience business transactions. *Carson v. Lee*, 166.

6. **Deed as Mortgage: Debt: Repayment.** The fact that the stipulation in the deed permitting the grantors to redeem and obligating the grantee to reconvey on the payment of a named sum, contained no agreement binding the grantors to pay the sum named or any part of it, is a circumstance of weight, though not conclusive, in determining whether or not the instrument was a mortgage. *Ib.*
7. ———: **Possession: Taxes: Surplus After Paying Debts.** The facts that the grantee was put into possession when the instrument was executed, that he was by it required to pay the taxes thereafter, and, where the grantors were financially embarrassed, that the consideration was more than grantors' debts paid by him and the balance was turned over to them, without note or other evidence of a loan, all likewise point significantly to a conclusion that the instrument was not a mortgage. *Ib.*
8. ———: **Subsequent Indemnifying Bond.** The fact that the purchaser from the grantee in a deed which contained a stipulation that the grantors might redeem upon the payment of a named sum of money, exacted of the surviving grantor and the grantee a bond to indemnify himself against loss because of an apprehended possible right in the heirs of the deceased grantor to redeem, and that of the purchase price paid by said purchaser a part was paid to said surviving grantor, whose ten-year right to repurchase had not expired, sheds no light on said original transaction and has no tendency to prove that said original deed was a mortgage, for the character of the transaction was fixed when said deed was made. *Ib.*
9. **Conditional Sale: Right of Heirs to Repurchase.** Some authorities holding an option to purchase property creates no interest that is either assignable to transmissible to heirs of the option-holder, are cited in the opinion, but the point is not ruled, because it is unnecessary to a proper adjudication of the issues. *Ib.*
10. **Covenants: In Deed and Mortgage.** A vendee who secures payment to his vendor of the price of his purchased property by mortgaging back with covenants the estate granted, does not thereby release the vendor from liability on his similar covenants. *Crosby v. Evans*, 202.
11. ———: ———: **Running With the Land.** The covenant of indefeasible seizure runs with the land when the deed containing it passes any interest to carry the covenant along, the purpose being to enable a remote grantee substantially damaged by the breach to recover his damage; but a purchase-money mortgage or deed of trust, given by a grantee who suffers from his grantor's broken covenant, does not carry back to the grantor the right to sue on the covenants in the original deed or cancel those covenants. *Ib.*
12. ———: ———: **Estoppel: Damages.** The grantee in a deed who gives back a deed of trust for the purchase money, containing similar covenants, does not estop himself thereby to sue on the covenants in the deed when a substantial breach occurs which damages him, nor create in the grantor a right to sue. *Ib.*

## LANDS AND LAND TITLES—Continued.

13. ———: Foreclosure of Deed of Trust by Agreement: Grantee's Right to Damages for Breach. The grantee, who gave a deed of trust back to secure the purchase money, did not lose his right to recover damages for breach of the covenants contained in his deed, if default in payment and foreclosure sale by the trustee occurred pursuant to a scheme arranged between said mortgagor and said mortgagee that the mortgagee was to buy in order to cure a fault in said mortgagor's title for which the mortgagee was liable on his covenant. *Ib.*
14. ———: ———: ———: Subsequent Sale. And where the agreement was that the deed of trust should be foreclosed and the property bought by the mortgagee in order to perfect title in the mortgagor, but the mortgagee, having purchased at the sale, conveyed to a third party, thereby cutting off the mortgagor's title, the mortgagor is entitled to maintain an action for breach of the covenant contained in the deed to him as grantee and recover the amount of purchase money paid by him after his eviction by such subsequent grantee. *Ib.*
15. ———: ———: ———: Interest. The mortgagor, in his action for damages for breach of covenants, is entitled to interest on money paid on the purchase price, only from date of eviction, and not from date of the payments, if he was meantime in possession and was not answerable over to any one for rents and profits. *Ib.*
16. ———: ———: ———: Reply: Departure: Confession and Avoidance. Where the defense set up in the answer to an action for damages by the grantee for breach of covenants in a deed, is that the plaintiff lost his right to sue as the result of the sale under the purchase-money deed of trust, a replication pleading, by way of confession and avoidance, an agreement that the property should be sold by the trustee in order to perfect the title in the defendant, does not state a new cause of action, and is not a departure, unless the agreement was a contract substituted for the covenants. *Ib.*
17. Quieting Title: Under Old Section 650; Effect of Judgment. Section 650, Revised Statutes 1899, contained no authority for a judgment affecting the title of persons not parties or privies. It did not authorize a judgment transferring the title of defendants to plaintiff; all that a decree in a suit under it could do, if properly brought, was to debar and estop the defendants, whether unknown heirs or devisees of a supposed record owner, and those in privity and claiming under them by subsequent deed or right, from setting up, as against the plaintiff and those claiming under her, the title in judgment in that suit. And especially is that the effect of such judgment, if the petition did not pray that defendants' title be transferred to plaintiff. All such a suit, under that statute, could decide was that the defendants had no title and that plaintiff had full title; the judgment did not vest in plaintiff a record title of the ancestor of the unknown heirs. *Hayti Devlp. Co. v. Clayton*, 221.
18. Adverse Possession: Conflict in Testimony. Where plaintiff in the suit to quiet title and ejectment had no record title, and the evidence as to whether it used the property in connection with other property possessed by it to create title by adverse possession was in dispute, the finding of the trial court settles the question on appeal. *Ib.*

## LANDS AND LAND TITLES—Continued.

19. **Lost Corners: Conflict Between Statute and Land Office Rule.** If the statute pertaining to the re-establishment of decayed corners of surveyed lands (Sec. 11322, R. S. 1909) operated to change the boundaries of United States surveys, so that one who purchased land according to those surveys would be divested of a portion of it, and another who did not purchase such portion would be invested with it, the statute, in so far as it conflicts with the rules of the General Land Office pertaining to the re-establishment of lost corners, would be void; but the statute can have no application where the original boundaries are known or can be ascertained, for before it can be invoked it must appear that the corner is not merely obliterated, but is *lost*—that is, that its *locus* cannot be determined either from the plat and field notes of the original survey, or by any competent extrinsic evidence. *Simpson v. Stewart*, 228.
20. ———: ———: **Statute Paramount.** The rule of the General Land Office is controlling in every instance in which it is sought to re-establish a lost internal section corner on the public lands of the United States; but as to lands within the State whose titles have passed to private owners and the jurisdiction of the U. S. Government in reference thereto has ceased, the statute is, in a sense, a rule of evidence, and, in cases in which it is applicable, is obligatory upon the courts. *Ib.*
21. **Conveyance: Latent Ambiguity: Admissibility of Acts of Parties.** When there is a latent ambiguity in the description of land as contained in the deed, the circumstances and situation of the parties and the construction they have put upon the deed by their acts, are admissible in evidence; but when the language of the deed contains no ambiguity, or when such language, applied to the subject-matter and circumstances, leaves no substantial doubt as to the property conveyed, then the acts of the parties under the deed are inadmissible. *Korneman v. Davis*, 234.
22. ———: ———: **Quantity.** An estimate of the land conveyed by a deed as "about thirty acres" is a part of the description, and may be used to ascertain the particular thing conveyed. *Ib.*
23. ———: ———: **Beneficent Acts of Grantor.** Where a father conveyed thirty acres of land lying south of a creek, as a gift to a daughter, reserving a life estate to himself, the taking possession by the daughter of an adjoining four-acre tract lying east of the creek and his acquiescence therein, a gift of a small amount of money arising from the sale of logs therefrom and a failure of the father to object to her taking timber therefrom to build an ice-house, are to be regarded as other acts of kindness towards the daughter without regard to his or her legal rights, and not as an interpretation by conduct of the description of the land contained in the deed, and are not admissible to show that the four-acre tract was conveyed. *Ib.*
24. **Divorce: Dower After Decree for Wife.** The wife's inchoate dower in her husband's real estate is unaffected by a decree granting her alone a divorce and awarding her alimony in a named sum of money, which is not adjudged to be in lieu of dower. *Vordick v. Vordick*, 279.
25. **Estate by the Entirety: Cotenants Upon Divorce Decree.** Residence property, bought by the husband by his bounty conveyed

## LANDS AND LAND TITLES—Continued.

to him and his wife as tenants by the entirety, by virtue of a decree of divorce in her favor becomes the property of the two equally as tenants in common. *Ib.*

26. **Conveyance: Interest and Not Land.** The granting clause of a deed of trust whereby the grantor doth "grant, bargain, sell, convey and confirm unto the said second party the following real estate: All of his right, title, share and estate in and to" certain lands, conveys whatever interest the grantor has, but not the land itself. The words "grant, bargain, sell, convey and confirm" do not purport to convey or warrant the land, or any particular interest therein, but only such right, title, interest or estate as the grantor has, whatever that interest may be. *Ridings v. Bank, 288.*
27. ———: ———: **Administration: Innocent Purchaser.** A purchaser for value at the foreclosure sale of a deed of trust by which the grantor conveyed his interest in certain land, and not the land itself, made during the course of the administration of his father's estate to secure the payment of his individual debt, acquired whatever right, title and interest the grantor had, subject to all equities the other heirs had against his share or interest in said property. A purchaser at said foreclosure sale, though for value, is not an innocent purchaser, but similar to the grantee in a quit-claim deed, who takes with notice, actual or constructive, of the equities of third parties. *Ib.*
28. **Administration: Sale of Interest by Heir: Voluntary Conveyance by Other Heirs to Pay Debts.** The joining by non-indebted heirs of an estate in the course of administration, in a private sale and conveyance of other estate lands, to obtain money with which to pay debts primarily those of another heir, but allowed against decedent's estate, and the payment thereby of such debts, cannot be considered as a voluntary loaning by such heirs to such debtor heir or to the estate of the money to pay his or its debts, but are acts in their nature coercive, brought about by his delinquency, and neither he, nor another claiming his interest in another tract as purchaser at the foreclosure of a deed of trust made by him after decedent's death to pay his individual debts, can take advantage of a situation brought about by his wrong. An heir indebted to decedent's estate, by reason of decedent's suretyship for him or otherwise, has in equity against the other heirs no definite share or interest in the estate, unless he pays such indebtedness, and failing to do so his interest or share is cut down to the extent of his debts to the estate; and the purchaser at the foreclosure of a deed of trust, by which he conveys his interest in the remaining lands to secure the payment of an individual debt, takes subject to the right of the other heirs, who have conveyed estate lands to pay estate debts, to be reimbursed out of his original share in such lands. *Ib.*
29. ———: ———: ———: **Final Settlement: Estoppel.** Heirs who assist the administratrix to pay estate debts, whereby she is enabled to make final settlement and be discharged, are not estopped to compel contribution, to the extent of a debtor heir's interest in estate lands conveyed by him to pay his individual debts. The grantee in such conveyance is not an innocent purchaser, a final settlement only indicates that there are no unsatisfied estate creditors, and such assistance is not voluntary. *Ib.*
30. ———: **Administrator De Bonis Non: Partition.** In a suit for partition brought by heirs, whether or not the appointment of an

## LANDS AND LAND TITLES—Continued.

administrator *de bonis non* was void or valid need not be determined, since he is not a necessary party. *Ridings v. Bank*, 283.

31. **Description: Starting Point: Parallelogram Presumed.** A lease which describes a tract in the City of St. Louis and State of Missouri as "one hundred feet running westward on Coal Bank Road, beginning at private road fronting house, and seventy feet running northward on private road, beginning at Coal Bank Road," fixes the starting point at the intersection of Coal Bank Road and the private road, and that being definite, a parallelogram, one hundred by seventy feet, will be presumed; and a definite tract extending one hundred feet westward, from the intersection of the two roads, along the north side of Coal Bank Road, and seventy feet northward along the west line of the private road, was described. *Kleine v. Kleine*, 317.
32. ———: ———: ———: **Extrinsic Evidence.** Extrinsic evidence is always admissible to explain the calls in a deed and for making certain any ambiguity in the description. If a surveyor can take the deed and from its descriptions locate with certainty the definite tract intended to be conveyed, the description is sufficient. *Ib.*
33. **Signing Deed: With Lead Pencil.** A deed or lease is not invalid because signed by lead pencil, instead of pen and ink. *Ib.*
34. **Conveyance: Voluntary: No Consideration: Cancellation: Lien.** A deed made by a grantor in full possession of his faculties and in no wise induced by undue influence or fraud, but voluntarily and of his own volition and without any agreement or promise on the part of the grantee, either directly or through others, to either pay money therefor or to support and care for the grantor in his old age, but made in pursuance of a long-cherished purpose to dispose of the land, either by deed or will, that the grantee would own it after the grantor's death, cannot be set aside, nor can a lien be declared on the land for supposed damages, *Hardway v. Hardaway*, 403.
35. **Resulting Trust: Whence and How It Arises.** A trust results in favor of a party who furnishes the purchase money for real estate, when the title is taken in the name of another. It arises from the facts, not from an agreement, but regardless of and sometimes in spite of an agreement. *Bender v. Bender*, 473.
36. ———: **Presumption: Conveyance to Wife.** The presumption is that the grantee in a deed conveying real estate intends to hold the title in trust for the person who paid the purchase money. But that presumption is overcome by another where the husband pays the purchase price and his wife is named as the grantee, for then the presumption is that he intended the conveyance *prima-facie* as a provision for her. But the presumption that he intended the conveyance to operate as a statement on his wife is rebuttable, but only under circumstances consistent with legal principles. *Ib.*
37. ———: **Coincident With Conveyance: Future Contingency: Express Trust.** A resulting trust must arise, if at all, at the instant the deed is taken. The transaction must be such that the trust arises the moment the title passes. If the trust in favor of the husband's children is made contingent upon the happening of

## LANDS AND LAND TITLES—Continued.

an event in the future, such as the legal separation or divorce of the husband and wife, the children do not have a resulting trust in real estate paid for by the husband and conveyed to him and his wife. *Ib.*

38. ———: **Parol Agreement to Hold in Trust: Express Trust.** Allegations that the husband's money paid for the real estate and that it was conveyed to him and her upon an agreement that in case of their legal separation or divorce, she and he would convey to their three children, is grounded on an express trust, which cannot be established by parol. *Ib.*
39. **Deed: Mutual Mistake: Intention: Reformation.** A deed is presumed to express the final agreements of the parties only when it in fact expresses their intention. Where the intention of the parties is not expressed, but the deed recites mutual mistakes, a court of equity can reform it to express their intention. *Maze v. Boehm*, 507.
40. ———: ———: **Character of Proof.** The burden of proof is on the party asserting that the deed did not express the intention of the parties, to establish the mistake and its mutuality, but such proof need not reach the high standard of beyond a reasonable doubt, but is sufficient if cogent, clear and convincing. *Ib.*
41. **Limitations: Possession: Pertinent to Good Faith.** Although a suit to quiet title does not turn on the question of adverse possession, but on the issue of mutual mistake in the description of the land in the deeds under which defendants claim, testimony regarding their possession is pertinent for consideration, as showing their good faith and intention in the transaction out of which their claim originated. *Ib.*
42. **Laches: Action at Law: Suit to Quiet Title.** Laches is no defense to an action at law. Where the petition and answer are not set out, but abstracted by appellant, and it is stated in this abstract that laches was interposed by the answer as a defense, but both this abstract and the statement of respondent also say that the petition was an ordinary action under the statute to quiet title, and the record shows the case was tried as one at law, the case will be so treated on appeal, and the finding of the judge sitting as a jury will be binding, for such a petition states a cause of action at law, and not in equity. *Brooks v. Roberts*, 551.
43. ———: ———: ———: **Taxes.** The mere non-payment of taxes on land does not show laches. *Ib.*
44. **Conveyance: Existence of Deed: Presumption: Payment of Taxes.** In the absence of any record, proof that a deed was made by the patentee to defendant's ancestor may be made either (1) by proof of such facts as will raise a presumption that such deed was made or (2) by direct evidence that such deed was made and had been lost or destroyed. But the presumption that a deed was made cannot arise from the mere payment of taxes for a period of years, either by such ancestor or his heirs or grantees; but ancient and long possession, coupled with other circumstances, will justify the presumption. Nor will evidence that defendant's ancestor was in possession of a patent, in which he was not named as patentee, aid the presumption that a deed was made by said patentee to him



## LANDS AND LAND TITLES—Continued.

as grantee. And the presumption aside, and no record of a deed or possession of the land being shown, the evidence should show a deed in fact. *Brooks v. Roberts*, 551.

45. **Limitations: Cotenants: Notice of Adverse Claim.** The institution of suit against the other descendants of an intestate decedent, by one of his children, in possession, to quiet title in her, is notice to them that an adverse possession is intended to be asserted against them. *Peper v. Union Trust Co.*, 562.
46. ———: **Arresting Running of Statute: No Action by Defendants Within Ten Years After Suit Brought.** Decedent had built a house and placed his daughter, the plaintiff, in possession, and she alleges it was a gift to her. He died intestate in 1903, and on January 27, 1904, she, being in possession, instituted suit against his other heirs, to have the title determined under the statute (Sec. 650, R. S. 1899); and on February 25, 1916, she filed her fourth amended petition, in which she averred that the property was given to her by her father, and that prior to his death she occupied the same and has since held the sole and exclusive possession thereof, "claiming the same as the owner and adverse to all persons whomsoever." To this petition defendants filed their answer in which they each claim an interest in the property adverse to the claim of plaintiff, ask the court to determine the title, charge plaintiff with rents and decree partition; and their first answer, filed June 5, 1907, was to the same effect. *Held*, that, under Section 1879, Revised Statutes 1909, which provides that "no action for the recovery of lands or of the possession thereof shall be commenced or maintained, unless it appear that the plaintiff or other person under whom plaintiff claims was seized or possessed within ten years before the commencement of said action," defendants are barred and plaintiff has title by limitations, unless, within ten years after plaintiff entered into possession, defendants arrested the running of the statute by the filing of their answers, for plaintiff's first petition, in which she asserted sole ownership, imparted notice to them, as cotenants with her, that she claimed adversely to them; and all of defendants' answers or cross-bills being statutory actions to determine title, for rent and for partition, none of them had for their object the recovery of the premises, and none of them operated to arrest the running of the statute, and therefore plaintiff has the title by limitations. (*GOODE, GRAVES and WOODSON, JJ.*, dissenting.) *Ib.*
47. ———: ———: ———: **By Demand for Rents.** A demand for rents set up in the answer to plaintiff's petition to determine title and asserting adverse possession, does not state an action for the recovery of the premises. *Ib.*
48. ———: ———: ———: **By Action to Quiet Title.** That portion of an answer or cross-bill which asks that the court ascertain and determine the title under the statute cannot be considered an action to recover land, such as is contemplated by Section 1879, Revised Statutes 1909, which says that no action to recover land or the possession thereof shall be commenced or maintained, unless it appear that plaintiff or other person under whom he claims was seized or possessed within ten years. The ten-year Statute of Limitations has no application to the bringing of a mere statutory action to determine title. *Ib.*

## LANDS AND LAND TITLES—Continued.

49. ———: ———: ———: **By Demand for Partition.** A suit in partition is not an action for the recovery of land, under the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); and a count praying for a decree of partition, in a cross-bill in a suit to determine title, which in no wise asserts a possessory right of the defendants, cannot be considered an action to recover the land or its possession. *Ib.*
50. ———: ———: ———: **By Count in Ejectment.** By a separate count in ejectment in their answer or cross-bill to plaintiff's petition to determine title, or by any other sufficient allegations of facts for affirmative relief, in which they plead ouster, assert their right to possession and pray that they be restored to possession, made within ten years, defendants can arrest the running of the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); but if no such possessory right is asserted in the answer or cross-bill, and it contains no denial of plaintiff's allegation, in her amended petition, of adverse and sole possession and claim of ownership for ten years, including the years which have expired since her suit was instituted, and the facts establish such possession in her, the running of the statute against defendants is not arrested. *Ib.*
51. ———: **Adverse Possession: Creates Title.** Adverse possession, accompanied by the well-known prerequisites, for the statutory period, not only bars any action for recovery, but operates to vest the full legal title in the possessor. *Ib.*
52. ———: ———: **Consistent With Action to Determine Title.** An action to determine title is not only not inconsistent with, but is entirely consistent with, plaintiff's adverse possession. *Ib.*
53. **Will: Intention: Implied Life Estate.** In construing a will effect must be given to the intention of the testator and, if necessary to carry out that intention, an estate, such as a life estate, may arise by implication from the terms of the will. *Wetzel v. Hecht*, 610.
54. ———: ———: **Life Estate or Homestead.** The will provided that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, that the will gave to testator's wife, not a homestead simply, to be terminated upon her subsequent marriage, but a life estate. *Ib.*
55. ———: ———: **Homestead During Life.** Where the will declares that "my homestead shall be left intact so long as my wife lives," the estate of the wife cannot be terminated by her subsequent marriage without ignoring the words "so long as she lives," and also the word "intact." *Ib.*
56. ———: ———: **Reconciling Inconsistencies: The Word Survive.** The will declared that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, first, that by the word "survive" he meant if the two daughters survive the

## LANDS AND LAND TITLES—Continued.

lifetime of the widow; *second*, that by the words "after she leaves the homestead" he did not mean "if she leaves," but meant any contingency by which she separated herself from the control of the property, either by death, marriage or abandonment, but that neither marriage nor abandonment would divest her of her quarantine right, which could be done only by her death. Thus construed, the apparent inconsistencies are harmonized, and the result is a life estate to her. *Wetzel v. Hecht*, 610.

57. **Deed: Construction: The Whole Instrument: Granting Clause: Habendum.** In construing a deed, the intention of the parties, as gathered from the entire instrument, together with the surrounding circumstances, are to be ascertained and given effect, unless in conflict with some positive rule of law or repugnant to the terms of the grant itself; and in gathering such intention from the instrument, the court will ignore technical distinctions between the various parts and seek the grantor's intention from them all, without undue preference to any, giving due effect to all, even to the extent of allowing the *habendum* clause to qualify or control the granting clause where it is manifest that the former, in connection with the whole, more nearly expresses the grantor's intention. *Welch v. Finley*, 684.

58. ———: ———: ———: ———: **Parenthetical Clause.** The deed made in 1867 recited that the grantors, "in consideration of the regard and affection we have for our daughter Fannie E. Finley and of the payment of eight hundred dollars by William Finley," do "hereby convey and sell to said Fannie and William two hundred and fifty acres.....most eastern fifty acres is the land sold to William Finley the other two hundred acres we give to Fannie." *Held*, that the granting clause is a clear and unambiguous conveyance to Fannie and William, and is not limited by the last parenthetical words, which are of doubtful and uncertain meaning and application.

*Held* by WILLIAMSON, J., dissenting, with whom BLAIR and GOODE, JJ., concur, that if an estate by the entirety had been intended the intention would have been expressed in some other words than the mere granting clause, and that the instrument as a whole declared an express purpose of a sale of fifty acres to William and a gift of two hundred to Fannie, and that purpose is strengthened by the order in which the grantees are named, in that the granting clause says that the grantors "convey and sell to Fannie and William," which in effect means that they convey to Fannie and sell to William. *Ib.*

59. ———: ———: ———: ———: ———: **No Several Tract: Husband and Wife: Change in Law.** That the clear words of the granting clause were not restricted by the ambiguous subsequent clause is reinforced by two other facts: *first*, the deed contains no word or phrase indicating that the grantors intended to convey in severalty to their daughter and her husband distinct parcels; and, *second*, at the time the deed was made (1867) the notion of unity of property and person of husband and wife was firmly fixed in the popular mind and in the law, and it was not unusual for a father, when he gave real estate as an advancement to a daughter, to deed it to both.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that a gift, by deed, to the daughter alone, had no

## LANDS AND LAND TITLES—Continued.

tendency to divert the title from the descendants of the grantors, and to construe the deed in judgment as a conveyance of an estate by the entirety to the grantors' daughter and her husband, and the vesting of the title first in him by her death and then in his collateral kindred upon his death is to vest the title in strangers to the grantors' blood, which is a result in no wise contemplated by the terms used in the deed. *Ib.*

60. ———: ———: **The Word Sold.** The word "sold," unaccompanied by others of apter significance, is not ordinarily a word of conveyance, but will be so considered in a proper setting, or where clearly so intended.

*Held*, by WILLIAMSON, J., with whom BLAIR and GOODE, JJ., concur, that the natural order of the words in a conveyance, and the usual sequence of events, is "sell and convey," and not "convey and sell;" and this reversal of the order in a deed by parents to a daughter and her husband, by which they "convey and sell to Fannie and William," is of significance, for there, the deed expressing as its consideration regard and affection for the daughter and a payment of \$800 by her husband, the meaning is that they conveyed to the daughter (the two hundred acres subsequently mentioned in the deed) and sold to him (the fifty acres mentioned therein). *Ib.*

## LAWS.

1. **Validity of Ordinance: Test Rule.** The validity of an ordinance enacted by the City of St. Louis in pursuance to its charter powers is to be tested by the rules of interpretation applicable to state legislative enactments. *Ex parte Lerner*, 18.
2. **Conflict: Rule of General Land Office: Statute Paramount.** The rule of the General Land Office is controlling in every instance in which it is sought to re-establish a lost internal section corner on the public lands of the United States; but as to lands within the State whose titles have passed to private owners and the jurisdiction of the U. S. Government in reference thereto has ceased, the statute is, in a sense, a rule of evidence, and, in cases in which it is applicable, is obligatory upon the courts. *Simpson v. Stewart*, 228.

## LIMITATIONS.

1. **Deed as Mortgage: Right of Redemption.** A conveyance in the form of a warranty deed, made and accepted as security for a debt, is a mortgage, and leaves in the mortgagor an equity of redemption which cannot be clogged or abridged by a stipulation in it that redemption must occur within ten years. *Carson v. Lee*, 166.
2. **Account Rendered: Continuous Account: Periodical Settlement.** The character of an account as a continuous or running one ceases at each periodical settlement thereof, and the Statute of Limitations commences to run from the date of the settlement against the implied promise to pay the balance shown thereby to be due. *Dameron v. Harris*, 247.
3. **Administration: Presentation of Claims: Exhibition to Administrator Within Six Months.** Section 195, Laws 1911, page 82, does not mean that the exhibition of a demand against the estate to the administrator for allowance within six months will alone stop the running of the special statute of limitations. A claimant can—281 Mo.—50.

## LAMITATIONS—Continued.

not avail himself of the fact that he exhibited his demand, by notice and in due time, to the administrator, unless he also presents it to the court for allowance within the time prescribed by the statute. *Home Ins. Co. v. Wickham*, 300.

4. **Administration: Claims: Exhibition to Administrator: Presentation to Court.** The Legislature did not intend by the amendatory Act of 1911, by striking out of Section 195 the words explicitly requiring demands to be presented to the court for allowance and substituting the words explicitly requiring it to be exhibited to the administrator for allowance, to make the section simply a reiteration of the requirement of Section 191, as amended, that a demand must be exhibited against the estate as provided in clauses five and six of Section 190, as amended, or be forever barred, but did intend to require a second exhibition to the administrator, the first being for the purpose of obtaining priority of classification, and the second for the purpose of having it allowed. Said Section 195, as amended, requires a demand to be presented to the court for allowance. At all times prior to 1911 and since 1855 two kinds of limitation sections have run along side by side in the Administration Statute, each serving different purposes and each indispensable and distinct from the other, the one requiring demands to be exhibited to the administrator within a designated period, and the other requiring them to be presented to the court for allowance within a designated time. *Ib.*
5. ———: ———: **Dismissal: Reinstated Within a Year.** Where the demand was exhibited to the administrator within six months after letters granted, and presented to the probate court more than six months after the last publication of notice, and then dismissed, a suit brought in the circuit court within one year after such dismissal, but more than one year after letters granted, or the last published notice, is barred by limitations, under the Act of 1911. The special limitation statute contained in said act controls, and the provision in the general limitation statute that a new action may be begun within one year after such dismissal does not apply. The exhibition of the demand to the administrator within six months does not stop the running of the special statute (Sec. 195, Laws 1911, p. 82) requiring the demand to be presented to the court for allowance "within one year after the granting of first letters on the estate, or the last insertion of the publication of notice of the grant of such letters." *Ib.*
6. **Purchase of Land Situate in Another State: Applicatory Statute.** In an action for fraud and deceit, practiced by defendants upon plaintiffs, resulting in the purchase of land situate in another state, the question of limitations is governed by the statute of such foreign state, since the transaction occurred in said state, although the suit is brought in this state. *Thompson v. Lyons*, 430.
7. **Fraud: Discovery: Diligence.** The statute of the foreign state in which the land transaction occurred, providing that "an action for relief on ground of fraud" shall be brought within two years, but that "the cause of action shall not be deemed to have accrued until the discovery of the fraud," cannot be held to bar the action on the sole ground that no facts were pleaded or proven to show that reasonable diligence was used to discover the fraud. The said statute has been construed by the courts of the foreign

## LIMITATIONS—Continued.

- state to mean that if for any reason no obligation exists to consult the record which the law requires to be kept as the source of information, or if the defrauded person be circumvented from taking advantage of his opportunity, no duty rests upon the defrauded person to improve with diligence the opportunity of learning that which the record discloses. No duty rests upon the defrauded person to examine records which do not impart notice, but which are the records of a private realty company, to whose books he has no right of access. *Ib.*
8. ———: ———: ———: **Recorded Deed: Consideration of One Dollar.** The Supreme Court of Kansas holds that a record imparts notice only of what it contains. The record of a deed reciting a consideration of one dollar, is not notice that the purchase price of the land was \$14,920, instead of \$32,400, which defendants represented to plaintiffs was the purchase price. That record imposed no duty on plaintiffs to use diligence to discover the fraud. *Ib.*
9. ———: ———: ———: **Fiduciary Relation: Partners.** Where plaintiffs and defendants had entered into partnership for the purchase of the land and defendants represented to plaintiffs that the land was worth \$32,400 and induced plaintiffs to put up \$16,200 for the purpose of a half interest, and with the money thus placed in their hands defendants bought the entire tract for \$14,960, and a deed conveying the tract to one of them expressed a consideration of only one dollar, there existed a fiduciary relation, and the plaintiffs had a right to rely on defendants' representations and were not required to use diligence to discover that they were false, and the Statute of Limitations did not begin to run until they actually discovered the fraud. *Ib.*
10. ———: **Time Between Death of Defendant and Administration.** The time elapsing between the death of a defendant and the appointment of his administrator is excluded in computing the time the Statute of Limitations has run. So that, in an action for fraud and deceit, if the time between the date when the fraudulent transaction was closed up and the date when defendant's administrator was brought in has not been five years, excluding the time which elapsed between the death of the defendant and the appointment of his administrator, the action is not barred by the Missouri Statute of Limitations. *Ib.*
11. **Possession: Pertinent to Good Faith.** Although a suit to quiet title does not turn on the question of adverse possession, but on the issue of mutual mistake in the description of the land in the deeds under which defendants claim, testimony regarding their possession is pertinent for consideration, as showing their good faith and intention in the transaction out of which their claim originated. *Maze v. Boehm*, 507.
12. **Cotenants: Notice of Adverse Claim.** The institution of suit against the other descendants of an intestate decedent, by one of his children, in possession, to quiet title in her, is notice to them that an adverse possession is intended to be asserted against them. *Peper v. Union Trust Co.*, 562.
13. **Arresting Running of Statute: No Action by Defendants Within Ten Years After Suit Brought.** Decedent had built a house and placed his daughter, the plaintiff, in possession, and she alleges it was a gift to her. He died intestate in 1903 and on

## LIMITATIONS—Continued.

January 27, 1904, she, being in possession, instituted suit against his other heirs, to have the title determined under the statute (Sec. 650, R. S. 1899); and on February 25, 1916, she filed her fourth amended petition, in which she averred that the property was given to her by her father, and that prior to his death she occupied the same and has since held the sole and exclusive possession thereof, "claiming the same as the owner and adverse to all persons whomsoever." To this petition defendants filed their answer in which they each claim an interest in the property adverse to the claim of plaintiff, ask the court to determine the title, charge plaintiff with rents and decree partition; and their first answer, filed June 5, 1907, was to the same effect. *Held*, that, under Section 1879, Revised Statutes 1909, which provides that "no action for the recovery of lands or of the possession thereof shall be commenced or maintained, unless it appear that the plaintiff or other person under whom plaintiff claims was seized or possessed within ten years before the commencement of said action," defendants are barred and plaintiff has title by limitations, unless, within ten years after plaintiff entered into possession, defendants arrested the running of the statute by the filing of their answers, for plaintiff's first petition, in which she asserted sole ownership, imparted notice to them as cotenants with her, that she claimed adversely to them; and all of defendants' answers or crossbills being statutory actions to determine title, for rent and for partition, none of them had for their object the recovery of the premises, and none of them operated to arrest the running of the statute, and therefore plaintiff has the title by limitations. (GOODE, GRAVES and WOODSON, JJ., dissenting.) *Peper v. Union Trust Co.*, 562.

14. **Arresting Running of Statute: After Suit Brought: By Demand for Rents.** A demand for rents set up in the answer to plaintiff's petition to determine title and asserting adverse possession, does not state an action for the recovery for the premises. *Ib.*
15. ———: ———: **By Action to Quiet Title.** That portion of an answer or cross-bill which asks that the court ascertain and determine the title under the statute cannot be considered an action to recover land, such as is contemplated by Section 1879, Revised Statutes 1909, which says that no action to recover land or the possession thereof shall be commenced or maintained, unless it appear that plaintiff or other person under whom he claims was seized or possessed within ten years. The ten-year Statute of Limitations has no application to the bringing of a mere statutory action to determine title. *Ib.*
16. ———: ———: **By Demand for Partition.** A suit in partition is not an action for the recovery of land, under the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); and a count praying for a decree of partition, in a cross-bill in a suit to determine title, which in no wise asserts a possessory right of the defendants, cannot be considered an action to recover the land or its possession. *Ib.*
17. ———: ———: **By Count in Ejectment.** By a separate count in ejectment in their answer or cross-bill to plaintiff's petition to determine title, or by any other sufficient allegations of facts for affirmative relief, in which they plead ouster, assert their right to possession and pray that they be restored to possession, made within ten years, defendants can arrest the running of the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); but if no such

## LIMITATIONS—Continued.

possessory right is asserted in the answer or cross-bill, and it contains no denial of plaintiff's allegation, in her amended petition, of adverse and sole possession and claim of ownership for ten years, including the years which have expired since her suit was instituted, and the facts establish such possession in her, the running of the statute against defendants is not arrested. *Ib.*

18. **Adverse Possession: Creates Title.** Adverse possession, accompanied by the well-known prerequisites, for the statutory period, not only bars any action for recovery, but operates to vest the full legal title in the possessor. *Ib.*
19. ———: **Consistent With Action to Determine Title.** An action to determine title is not only not inconsistent with, but is entirely consistent with, plaintiff's adverse possession. *Ib.*

## MACHINERY.

1. **Dangerous: Duty to Guard When Statute Does Not Apply.** Independently of the statute and at common law, if ordinary care requires that dangerous machinery be guarded in order to render the place in which the servant is directed to work reasonably safe, then the master is liable for injuries to the servant resulting from a failure to exercise such care. *Kuhn v. Lusk*, 324.
2. ———: ———: **Ordinary Care.** In Missouri the master incurs liability for failure to guard dangerous machinery where ordinary care for the safety of his servants requires it to be guarded, and that duty remains, although the statute requiring dangerous machinery to be guarded has no application to the situation. *Ib.*
3. ———: ———: ———: **Assumption of Risks.** The rule in Missouri is that the servant does not assume a risk that grows out of his master's negligence, however obvious or plain, but only assumes the peril incident to the service remaining after the master has exercised ordinary care; and in the exercise of ordinary care, in all occupations attended with great and unusual danger, the master is required to provide all appliances readily attainable and known to science for the prevention of accidents; and where the facts demonstrate that the master had in operation a machine about which he required his servant to work, that the danger was strikingly apparent, that at a trifling expense a guard or cover around such machine could have been maintained, which would in no wise have lessened its efficiency, and that if the guard had been maintained the danger to the servant would have been wholly removed, ordinary care required the master to provide the guard. *Ib.*

MEASUREMENTS. See **Excavations.**

## MORTGAGES AND DEEDS OF TRUST.

1. **Deed as Mortgage: Right of Redemption: Limitations.** A conveyance in the form of a warranty deed, made and accepted as security for a debt, is a mortgage, and leaves in the mortgagor an equity of redemption which cannot be clogged or abridged by a stipulation in it that redemption must occur within ten years. *Carson v. Lee*, 166.



## MORTGAGES AND DEEDS OF TRUST—Continued.

2. **Deed as Mortgage; The Word Redeem: Intention.** Whether or not a deed, otherwise absolute, is to be construed to be a mortgage, is not to be determined by the use of the word "redeem" used in a stipulation clause therein by which the grantee agrees that the grantors "may at any time within ten years redeem said land" and upon the payment of a named sum of money he "will reconvey" to them, for though the word is appropriate to express an equitable right of redemption, it is not of fixed meaning, and the nature of the instrument, whether mortgage or conditional sale, is not determined by its use, but by the intention of both parties at the time it was made. If made to be a mortgage it retains the character then intended; otherwise, a deed absolute on its face, with an agreement to reconvey upon conditions, cannot be construed to be a mortgage, but is a conditional sale or deed of purchase. *Carson v. Lee*, 166.
3. ———: **Intention: Extraneous Evidence.** The terms of a deed may show so clearly on its face the real understanding of the parties, that no aid from extraneous circumstances is required or permitted to interpret it. On the other hand, it may leave the question whether it is a mortgage or deed of purchase in such doubt, that extraneous evidence is necessary to determine its character, and then such evidence is competent. *Ib.*
4. ———: **Debt.** A condition indispensable to a holding that a warranty deed was intended to be a mortgage is that there must have been a debt to secure, or some liability against which the grantee is to be guarded; for the purpose of a mortgage is security. *Ib.*
5. ———: ———: **To Pay Debts.** Where the grantee was surety for one of the grantors on notes to the amount of a few hundred dollars, but neither was otherwise indebted to him, the notes were paid out of the \$4000 named as the consideration for the deed, as was an existing mortgage for \$800, and no assignment of any of the notes was made to the grantee, and there is no evidence that the balance of the consideration was advanced as a loan to either grantor, and no loan evidencing a debt was taken and no debt was mentioned in the deed, there was no debt secured by the instrument, and to hold there would be to run counter to all ordinary experience in business transactions. *Ib.*
6. ———: ———: **Repayment.** The fact that the stipulation in the deed permitting the grantors to redeem and obligating the grantee to reconvey on the payment of a named sum, contained no agreement binding the grantors to pay the sum named or any part of it, is a circumstance of weight, though not conclusive, in determining whether or not the instrument was a mortgage. *Ib.*
7. ———: **Possession: Taxes: Surplus After Paying Debts.** The facts that the grantee was put into possession when the instrument was executed, that he was by it required to pay the taxes thereafter, and, where the grantors were financially embarrassed, that the consideration was more than grantors' debts paid by him and the balance was turned over to them, without note or other evidence of a loan, all likewise point significantly to a conclusion that the instrument was not a mortgage. *Ib.*

## MORTGAGES AND DEEDS OF TRUST—Continued.

8. ———: **Subsequent Indemnifying Bond.** The fact that the purchaser from the grantee in a deed which contained a stipulation that the grantors might redeem upon the payment of a named sum of money, exacted of the surviving grantor and the grantee a bond to indemnify himself against loss because of an apprehended possible right in the heirs of the deceased grantor to redeem, and that of the purchase price paid by said purchaser a part was paid to said surviving grantor, whose ten-year right to repurchase had not expired, sheds no light on said original transaction and has no tendency to prove that said original deed was a mortgage, for the character of the transaction was fixed when said deed was made. *Ib.*
9. **Covenants: In Deed and Mortgage.** A vendee who secures payment to his vendor of the price of his purchased property by mortgaging back with covenants the estate granted, does not thereby release the vendor from liability on his similar covenants. *Crosby v. Evans*, 202.
10. ———: ———: **Running With the Land.** The covenant of indefeasible seizure runs with the land when the deed containing it passes any interest to carry the covenant along, the purpose being to enable a remote grantee substantially damaged by the breach to recover his damage; but a purchase-money mortgage or deed of trust, given by a grantee who suffers from his grantor's broken covenant, does not carry back to the grantor the right to sue on the covenants in the original deed or cancel those covenants. *Ib.*
11. ———: ———: **Estoppel: Damages.** The grantee in a deed who gives back a deed of trust for the purchase money, containing similar covenants, does not estop himself thereby to sue on the covenants in the deed when a substantial breach occurs which damages him, nor create in the grantor a right to sue. *Ib.*
12. ———: **Foreclosure of Deed of Trust by Agreement: Grantee's Right to Damages for Breach.** The grantee, who gave a deed of trust back to secure the purchase money, did not lose his right to recover damages for breach of the covenants contained in his deed, if default in payment and foreclosure sale by the trustee occurred pursuant to a scheme arranged between said mortgagor and said mortgagee that the mortgagee was to buy in order to cure a fault in said mortgagor's title for which the mortgagee was liable on his covenant. *Ib.*
13. ———: ———: ———: **Subsequent Sale.** And where the agreement was that the deed of trust should be foreclosed and the property bought by the mortgagee in order to perfect title in the mortgagor, but the mortgagee, having purchased at the sale, conveyed to a third party, thereby cutting off the mortgagor's title, the mortgagor is entitled to maintain an action for breach of the covenant contained in the deed to him as grantee and recover the amount of purchase money paid by him after his eviction by such subsequent grantee. *Ib.*
14. ———: ———: ———: **Interest.** The mortgagor, in his action for damages for breach of covenants, is entitled to interest on money paid on the purchase price, only from date of eviction, and not from date of the payments, if he was meantime in

**MORTGAGES AND DEEDS OF TRUST—Continued.**

possession and was not answerable over to any one for rents and profits. *Crosby v. Evans*, 202.

15. **Foreclosure: Mortgagor's Interest: Administration: Innocent Purchaser.** A purchaser for value at the foreclosure sale of a deed of trust by which the grantor conveyed his interest in certain land, and not the land itself, made during the course of the administration of his father's estate to secure the payment of his individual debt, acquired whatever right, title and interest the grantor had, subject to all equities the other heirs had against his share or interest in said property. A purchaser at said foreclosure sale, though for value, is not an innocent purchaser, but similar to the grantee in a quit-claim deed, who takes with notice, actual or constructive, of the equities of third parties. *Ridings v. Bank*, 288.

**MUNICIPAL CORPORATIONS. See Cities.****NAME.**

1. **Identity of: Identity of Person.** Identity of person is to be presumed from identity of name. But the presumption may be overcome by credible evidence. The presumption only establishes a prima-facie case. The jury, or the court sitting as a jury, may believe or disbelieve such evidence; if believed, the presumption fails; if disbelieved, the presumption will authorize a verdict. *Brooks v. Roberts*, 551.
2. ———: ———: **Instruction: Reasonable Doubt.** An instruction on the presumption of identity of person arising from identity of name should not require the trier of the facts to find the identity of person beyond a reasonable doubt, or otherwise ignore the presumption. The term "reasonable doubt" or similar expressions have no place in instructions in a civil case. *Ib.*

**NEGLIGENCE.**

1. **Charity: Personal Injury to Patient: Recovery of Damages.** A charitable association is not liable in damages for personal injuries to its patients caused by the negligence of its trustees, servants or employees. The funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted or absorbed by claims arising from the negligence of the trustees or employees. *Nicholas v. Deaconess Home*, 182.
2. ———: ———: ———: **Pay Patient.** The fact that the patient at the hospital of the charitable association was not a charity patient, but paid for all the services rendered by the nurses and for the medicines and supplies furnished by the association, does not entitle her to recover damages for injuries caused by the negligent application by a nurse of carbolic acid, instead of alcohol, to her skin, during the course of a massage prescribed by her physician. *Ib.*
3. **Dangerous Machinery: Duty to Guard When Statute Does Not Apply.** Independently of the statute and at common law, if ordinary care requires that dangerous machinery be guarded in order to render the place in which the servant is directed to

## NEGLIGENCE—Continued.

work reasonably safe, then the master is liable for injuries to the servant resulting from a failure to exercise such care. Kuhn v. Lusk, 324.

4. ———: ———: **Ordinary Care.** In Missouri the master incurs liability for failure to guard dangerous machinery where ordinary care for the safety of his servants requires it to be guarded, and that duty remains, altogether the statute requiring dangerous machinery to be guarded has no application to the situation. *Ib.*
5. ———: ———: ———: **Assumption of Risks.** The rule in Missouri is that the servant does not assume a risk that grows out of his master's negligence, however obvious or plain, but only assumes the peril incident to the service remaining after the master has exercised ordinary care; and in the exercise of ordinary care, in all occupations attended with great and unusual danger, the master is required to provide all appliances readily attainable and known to science for the prevention of accidents; and where the facts demonstrate that the master had in operation a machine about which he required his servant to work, that the danger was strikingly apparent, that at a trifling expense a guard or cover around such machine could have been maintained, which would in no wise have lessened its efficiency, and that if the guard had been maintained the danger to the servant would have been wholly removed, ordinary care required the master to provide the guard. *Ib.*
6. **Not Supported by Evidence.** Specific defects in a machine, charged in the petition to be a cause of plaintiff's injury, which are not established by any substantial evidence, should not by the instructions be submitted to the jury as a basis for plaintiff's right to recover. *Ib.*
7. ———: **Recovery on Different Specifications.** If the jury are by the instructions permitted to find for plaintiff on either of two specifications of negligence, and as to one of them the evidence is sufficient to support a finding, a verdict and judgment for him must be set aside and the cause retried. *Ib.*
8. **Obvious Danger: Question for Jury.** Plaintiff testified that he knew and fully appreciated the danger attendant upon cleaning the boxing next to the revolving cog-wheel, but as the gears fed upward he thought he could reach over the axle and wipe the grease from the under side without his coat sleeve being drawn into the cogs. *Held*, that, whether the danger of so doing was so great that an ordinarily careful and prudent man would not have attempted it was a question for the jury. *Ib.*
9. **Automobile Injury to Traveler: Stopping Car: Knowledge of Peril.** Where there is substantial evidence that the automobile truck could have been stopped within a few feet, that the night was clear and the driver could have seen plaintiff skating on the roadway at the intersection of two traveled streets, three blocks away, and that the driver neither slackened his speed nor signaled his approach, whether he could have reduced his speed and stopped before he reached plaintiff, and whether he knew or by carefully watching would have known, plaintiff was in peril

## NEGLIGENCE—Continued.

from the truck if he proceeded farther, were questions for the jury to determine. *Ballman v. Teaming Co.*, 342.

10. ———: ———: ———: ———: **Contributory Negligence.** Even though the inference from the evidence that the negligence of the little boy skating in the roadway at the intersection of two traveled streets contributed to his injury is unavoidable, if the evidence leaves the jury free to find that the driver of the automobile truck had a fair chance to avoid running over the boy, after his danger became apparent to the driver, or would have done so had he kept a proper lookout, the case is for the jury. *Ib.*
11. ———: ———: ———: ———: **Verdict Notwithstanding: Children Playing on Street.** Testimony by the little boy that he looked west when at the north line of the east-and-west street and saw no vehicle coming and the fact that he was struck by an automobile traveling eastward, at the end of the arc around which he skated in turning back northward in the north-and-south cross street, and testimony of a companion, five or six feet behind him, that as he entered the east-and-west street he saw the automobile a half block away, have a tendency to prove that the automobile was on the left side of the street, and that the driver had ample time to signal, to veer his machine to the south so as to miss the boy, or to stop, and is sufficient to authorize a verdict for plaintiff, notwithstanding the boy's movements and neglect to watch out for his safety as participating causes of his injury. Admitting that if his companion saw the automobile the ten-year-old boy could also have seen it, the immaturity of the boy, the habits of boys to play on the streets, the thoughtlessness of children as compared to men, and the failure of the driver to signal, must also be considered, and it was proper to submit the issue of negligence of the driver in ways alleged in the petition other than in not doing what he could to avoid the collision, after he knew, or could have known, it was impending. *Ib.*
12. **Evidence: Experiments: Similar Conditions.** For experiments made to determine whether certain signs painted on the automobile truck which struck the plaintiff were visible by plaintiff and his companion, conditions under which the incident in dispute happened must be the same in essential particulars as those under which the tests were made; and in this case, in which was admitted the testimony of several witnesses for plaintiff to prove, by way of experiments, that it was possible for the two boys to have read the sign, as they testified they did, it is held that the conditions were not sufficiently reproduced in the experiments for the result to be admitted in evidence. *Ib.*
13. **Instruction: No Itemization of Specific Acts.** An instruction for plaintiff, which not only directs the jury to find for him if the specific acts of negligence declared on, were committed, but also if the driver of defendant's automobile truck operated and propelled it in a manner which, under all the circumstances mentioned in evidence, was not careful and prudent, is erroneous. A defendant charged with a negligent tort has the right to be informed what particular negligent acts plaintiff relies on, and the instruction should require the jury to find one or more of the specific acts which, the evidence tends to establish. *Ib.*

## NEGLIGENCE—Continued.

14. **Automobile: Driver's Degree of Care: Contributory.** A driver of an automobile on a public highway is required to use "the highest degree of care that a very careful person would use under like or similar circumstances," and the statute establishes a general rule for all drivers, not only to protect the lives and property of others, but also to protect themselves and others traveling with them from injury by collision with obstructions in the road, whether legally or unlawfully placed there. Any less degree of care by the driver is contributory negligence, and bars a recovery by him for personal injury from the telephone company which had placed the obstruction in the road. *Jackson v. Tel. Co.*, 358.
15. ———: **Care Defined.** Ordinary care is such care as would ordinarily be exercised by an ordinarily careful person under the same or similar circumstances. But the statute requires the driver of an automobile on a public highway to exercise "the highest degree" of care that a "very careful person" would use under like or similar circumstances; and those words mean the highest care and caution of an experienced and competent chauffeur, since an automobile is an exceedingly dangerous machine unless kept under control. They do not mean the highest conceivable degree of prudence and skill possible to man, but the highest degree that has been demonstrated to be practicable. *Ib.*
16. ———: **Contributory: Question for Jury.** Under the Automobile Statute of 1911, if reasonable men may honestly differ as to whether the driver of the automobile, the circumstances considered, exercised the highest degree of care of a very careful person, the question of his contributory negligence is for the jury to settle; but if his failure to exercise such care is apparent to all reasonable men from the undisputed facts in evidence, then it becomes the duty of the court to declare, as a matter of law, that his contributory negligence bars a recovery; and in this case it is held that plaintiff's own undisputed testimony unquestionably shows that he was not exercising the highest degree of care of a very careful person, and therefore a demurrer should have been sustained. *Ib.*
17. ———: **To Right of Center of Road.** The statute (Par. 9, sec. 8, Laws 1911, p. 327) requires the driver of an automobile to turn to the right of the center in approaching a turn in the public highway only when he meets another person riding or driving a horse or another motor vehicle; if there is no other person or vehicle on the road, he has the right to use the center, and even the left side. *Ib.*
18. ———: **Skidding: Knowledge of Driver.** Where the driver of the automobile left the smooth and beaten center of the public road, when there was no necessity for doing so, and encountered clods which caused his car to skid and strike a guy telephone pole, his contributory negligence cannot be excused by a failure of the evidence to show that he did not know that automobiles would skid in turning on to rough ground and clods. A very careful person, exercising the highest degree of care, venturing to drive an automobile at a turn in the public highway, at a speed of twelve or fifteen miles an hour and with the power off, thirty or forty feet over dry clods and rough ground, in daylight, his view unobstructed, would, before doing so, at least inform himself as to the

## NEGLIGENCE—Continued.

common conditions and places in the roads which cause such vehicles to skid. *Jackson v. Tel. Co.*, 358.

19. **Lease: Liability of Landlord: Negligent Construction.** A landlord, under no obligation, legal or contractual, to make repairs, who nevertheless undertakes to make repairs and negligently creates a defect or danger whereby the tenant, himself in the exercise of due care, is injured, is liable in damages; but if the agreed statement shows no negligence in workmanship or in the selection of materials, or whether the section of the porch railing which gave way when plaintiff's wife leaned against it was at the time in the same condition it stood immediately after being repaired, there can be no recovery. The mere fact that the railing was not replaced by new timber does not prove negligence. *Byers v. Essex Inv. Co.*, 375.
20. ———: ———: ———: **Res Ipsa Loquitur: Agreed Statement.** If the petition pleads specific negligence, reliance upon the doctrine of *res ipsa loquitur* is thereby excluded; and a statement of facts agreed upon for the purpose of obviating the introduction of evidence does not alter the rule, for such an agreed statement is not an agreed case under the statute or at common law. *Ib.*
21. ———: ———: ———: ———: **Application to Situation.** The basis of the presumption inherent in the rule of *res ipsa loquitur* is the doctrine of probabilities. There is not such probability that the breaking of a wooden porch railing, which gave way when plaintiff's wife leaned against it, was due to negligence in repairing it ten months previously, as to justify an application of the rule, there being no showing that the part which gave way was repaired. *Ib.*
22. ———: ———: ———: ———: **Peculiar Knowledge: Voluntary Act.** The rule of *res ipsa loquitur* as establishing negligence on the part of the landlord does not apply where the cause of the fall of plaintiff's wife from the porch was not peculiarly within the knowledge of the landlord and peculiarly beyond that of plaintiff. Nor does it apply if the voluntary act of plaintiff's wife was immediately connected with her fall. *Ib.*
23. **Evidence: Substantial for Plaintiff: Appellate Practice.** If plaintiff's testimony that he stumbled over a brake-beam lying in defendant's railroad yard is substantial and is not contrary to reason, the appellate court will accept the verdict of the jury finding it to be true. *Lock v. C. B. & Q. Ry. Co.*, 532.
24. **Dangerous Place: Brake-Beam in Yards: Constructive Notice of Location.** At different times cars were repaired in defendant's railroad yard, their parts separated, and it was customary to take out brake-beams and drop them near at hand, to be subsequently removed; a car was being repaired near the scene of the accident on the day preceding it; the yard belonged to defendant and was fenced; and plaintiff, a switch-tender, testified that having aligned the rails so as to permit a train to pass, at four o'clock of a dark and rainy December morning, he started to walk across the yard to a shanty where he stayed when not engaged in adjusting the switches, and while looking ahead to determine his course, he stumbled over a brake-beam, fell to the ground, and before he could arise a switch engine on a lead

## NEGLIGENCE—Continued.

track struck him. *Held*, that the other facts were circumstances confirmatory of plaintiff's testimony, and that, under the Federal Employers' Liability Act, defendant cannot escape liability on the ground that the evidence failed to show it had either actual or constructive notice of the location of the brake-beam. *Ib.*

25. ———: ———: **Act of Servant.** Under the Federal Employers' Liability Act, a switch-tender is not required to show a negligent pilaging of a brake-beam in the railroad yards, over which he stumbled and fell; but the leaving of the beam at said point was a negligent act and bound the company as effectually as if it, as principal, had left it there. *Ib.*
26. ———: ———: **Assumption of Risk.** A switch-tender, having aligned the tracks at the switches and started to the shanty where he stayed when not so engaged, at four o'clock on a dark and rainy December morning, had a right to assume that the railroad company had exercised proper care to provide a reasonably safe place for him to work, free from any obstacles which would cause his injury, and that a brake-beam, over which he stumbled, had not been left in the yard over which he customarily passed; the leaving of the beam in such place, at such time, did not constitute a risk normally incident to his employment. *Ib.*
27. ———: ———: **Evidence of Customary Acts.** Where the railroad yard through which the switch-tender passed in going in the night time to a shanty in which he stayed between his acts in aligning tracks, was used by defendant in the conduct of its business, testimony that it was the practice of the employees to scatter materials over the yard in repairing cars is admissible, the switch-tender having stumbled over a brake-beam in the yards and having been injured thereby. While such acts are in a sense collateral, an inference of fact bearing on the particular act of negligence may properly be drawn from them. *Ib.*
28. ———: ———: **Collateral Fact.** The rule is that if a collateral fact bearing on the main issue is so intimate and valuable as to tend to prove the main fact, it is competent evidence. *Ib.*
29. **Damages: Under Federal Act: Contributory: Instruction.** It is proper to instruct the jury, in a suit for personal injuries brought under the Federal Employers' Liability Act, that the amount of plaintiff's damages may be reduced in the proportion that his own negligence contributed to his injury; and the instruction on the subject in this case is unobjectionable.
30. **Verdict: Excessive: \$10,000.** Under the Federal Act, an injured employee is entitled to such damages as will compensate him for expenses incurred, loss of time, suffering and diminished earning power, and the amount recoverable is not otherwise limited or restricted, except where he has been guilty of contributory negligence; and there being no such negligence, a verdict of \$10,000 for the loss of an arm and a gash above the eye which impairs the sight, supported by substantial evidence and approved by the trial court, vested with authority to set it aside if excessive, is approved. *Ib.*
31. **Safe Place: Narrow and Unlighted Platform.** A petition which states that deceased was ordered and directed to stand



## NEGLIGENCE—Continued.

twelve feet above a concrete floor on a platform twelve inches wide, and while so standing to reach up six feet and regulate the dampers to a boiler; that the platform was unsafe, because too narrow for deceased to perform his labors with safety, because it had no railing to prevent a person on it from falling off and because it was inadequately lighted; and that, while performing the said work, deceased fell and was killed, states a cause of action. And particularly does the averment that it was dark on the platform tender an issue to be submitted to a jury. *Williamson v. L. & P. Co.*, 544.

32. —: **Assumption of Risk.** Although the height and narrow width of the platform on which deceased was required to work were apparent, and although the danger in adjusting the dampers of the boilers which his employment required him to regulate was apparent, he did not assume such risks; but he assumed only such risks, in respect to the place where he was put to work, as were incident to the service after his employer performed his duty by using care to provide a place of reasonable safety. Although the danger may be obvious, if this is due to a lack of care on the part of the master in furnishing him a safe place, the servant does not assume the risk. *Ib.*
33. —: **Contributory.** Unless to perform on the platform the work with which the servant was occupied at the time he fell appears conclusively from the allegations to have been plainly hazardous to a degree that would have deterred a man of ordinary prudence from undertaking to perform it, he cannot be defeated on the score of contributory negligence, as a matter of law, upon a demurrer to the petition. *Ib.*
34. **Attractive Nuisance: Wall About Park.** A wall about a city park, twenty feet in height in places, but its height depending on the topography of the ground, topped with a coping thirty inches wide, is not an attractive nuisance, within the doctrine of the turntables cases, to a child, an invitee of the city, who, in play, enters upon the wall at a low place, and falls from it at its highest place, and the Court of Appeals, in approving an instruction which submitted to the jury that theory of negligence, contravened *Kelly v. Benas*, 217 Mo. l. c. 13; *O'Hara v. Gas Light Co.*, 244 Mo. l. c. 404, and *Buddy v. Union Terminal Ry. Co.*, 276 Mo. 276. *State ex rel. Kansas City v. Ellison*, 667.
35. **Instruction: Injuries at Other Times and Places.** The trial court did not commit prejudicial error in instructing the jury that the mere fact that plaintiff at some time may have sustained broken ribs and other injuries was not proof that he was injured at the time and in the manner asserted by him, if there was direct testimony that he was neither on nor within several feet of defendant's car at the time he claims to have been injured and he did not call a doctor or notify defendant for four months thereafter. *Ulrich v. C., B. & Q. Ry. Co.*, 697.
36. —: **Conflicting.** An instruction authorizing the jury to find for defendant if they believe "from all the facts and circumstances in the case" that plaintiff had not received any injury is not in conflict with another for defendant requiring plaintiff to make out his case "by the greater weight of the credible evidence in the case." They do not set up different standards of the

**NEGLIGENCE—Continued.**

weight of evidence requisite to warrant a finding, but the one places the burden on plaintiff and the other presents the matter from the point of view of defendant, on whom rests no such burden. *Ib.*

37. ———: **Expert Testimony: No Injury.** Error in an instruction concerning expert testimony is not prejudicial, where the testimony has reference to the character, extent and permanency of plaintiff's injury and spends its force on the issue as to the amount of damage, and the jury finds that he was not injured by defendant at all. Besides, the instruction here complained of was, in substantially the same form, approved in *Hoyberg v. Henske*, 153 Mo. 1. c. 75, and numerous later cases. *Ib.*
38. ———: **To Disregard Testimony.** An instruction for defendant telling the jury that they were authorized to disregard testimony, if any, opposed to obvious physical facts or in contradiction of the common knowledge and experience of mankind, was not prejudicial under the facts of this case, where both court and jury had full opportunity to observe whether plaintiff's actual physical condition and conduct accorded with his testimony. *Ib.*

**NOTICE.**

1. **Sale of Properties: Liability of Vendee for Unpaid Debts.** Where two corporations, at the time one of them transferred all its tangible assets to the other, had the same executive officers, the same claims department, the same counsel, and, with the exception of one member of each board, the same individuals upon the board of directors of each, the transferee company was chargeable with notice of the existence of judgments and suits for judgments against the other company, whether or not the transferee company, in the assignment instruments, assumed to pay such claims. [Per *WILLIAMSON, J.*, with whom *WALKER, C. J.*, and *WILLIAMS, J.*, concur.] *Johnson v. United Rys.*, 90.
2. **Taxes: Assessed in Name of Another.** An assessment of land or lots in numerical order, or by plats and a "land list" in alphabetical order, in the manner prescribed by the statutes, imparts notice to the owner that the land is assessed and liable to be sold for the taxes chargeable thereon; and, when so assessed, the actual owner is not prejudiced because it was assessed in the name of another. *Stats ex rel. McKee v. Clements*, 195.

**NUISANCE.**

**Attractive: Wall About Park: Damages.** A wall about a city park, twenty feet in height in places, but its height depending on the topography of the ground, topped with a coping thirty inches wide, is not an attractive nuisance, within the doctrine of the turntable cases, to a child, an invitee of the city, who, in play, enters upon the wall at a low place, and falls from it at its highest place, and the Court of Appeals, in approving an instruction which submitted to the jury that theory of negligence, contravened *Kelly v. Benas*, 217 Mo. 1. c. 13; *O'Hara v. Gas Light Co.*, 244 Mo. 1. c. 404, and *Buddy v. Union Terminal Ry. Co.*, 276 Mo. 276. *State ex rel. Kansas City v. Ellison*, 667.

**OPPRESSION.** See **Trusts and Combinations**, 5.

**OPTION.**

**Conditional Sale: Right of Heirs to Repurchase.** Some authorities holding an option to purchase property creates no interest that is either assignable or transmissible to heirs of the option-holder, are cited in the opinion, but the point is not ruled, because it is unnecessary to a proper adjudication of the issues. *Carson v. Lee*, 166.

**PARTIES TO ACTION.**

1. **Assignment: Cause of Action: Pending Stipulation as to Settlement: Substitution.** An action in ejectment pending in the proper court, with a stipulation on file between all the parties agreeing to a final disposition of the case, is assignable, and a conveyance by quit-claim deed, executed by plaintiffs, in which they convey to a named grantee all their right, title and interest in the land and to the damages for rents and profits, is such an assignment, and entitles the grantee to be substituted as plaintiff, unless the cause of action had already been lost for some other reason. *Norton v. Reed*, 482.
2. ———: **Ejectment Against Grantor: Stipulation for Judgment.** The purchaser from the defendant in ejectment, by deed executed one day before suit is filed but not recorded until one day after, is, under the statute (Sec. 1732, R. S. 1909), entitled to be joined as codefendant and to defend his title, or to have it defended in the name of the original defendants. And if a stipulation is signed by the attorney for the original defendants that the action shall remain on the docket and abide the result in another pending suit, he and his grantee are bound by the stipulation. *Ib.*

**PARTITION.**

1. **Administrator De Bonis Non.** In a suit for partition brought by heirs, whether or not the appointment of an administrator *de bonis non* was void or valid, need not be determined, since he is not a necessary party. *Ridings v. Bank*, 288.
2. **Limitations: Demand for Possession: By Demand for Partition.** A suit in partition is not an action for the recovery of land, under the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); and a count praying for a decree of partition, in a cross-bill in a suit to determine title, which in no wise asserts a possessory right of the defendants, cannot be considered an action to recover the land or its possession. *Peper v. Union Trust Co.*, 562.

**PHYSICIAN AND SURGEON.**

**Professional Services: Mechano-Therapist: No License.** A mechano-therapist, having no license to practice, cannot recover for his services as "a practitioner of drugless healing" and of "the chiropractic method." [Approving and adopting opinion of Springfield Court of Appeals in *O'Bannon v. Wydick*, 197 S. W. Rep. 432.] *O'Bannon v. Wydick*, 478.

**PLEADING.**

1. **Damages: Breach of Covenant: Reply: Departure: Confession and Avoidance.** Where the defense set up in the answer to an action

## PLEADING—Continued.

for damages by the grantee for breach of covenants in a deed, is that the plaintiff lost his right to sue as the result of the sale under the purchase-money deed of trust, a replication pleading, by way of confession and avoidance, an agreement that the property should be sold by the trustee in order to perfect title in the defendant, does not state a new cause of action, and is not a departure, unless the agreement was a contract substituted for the covenants. *Crosby v. Evans*, 202.

2. **Evidence: Former Pleading.** An answer, abandoned by the filing of an amended one, may be offered in evidence by plaintiff as an admission on defendant's part. *Parsons v. Harvey*, 413.
3. **Cause of Action: Fraud and Deceit.** A petition alleging that defendants represented to plaintiffs, that a certain tract of 10.4 acres was worth \$3000 an acre, that it could be bought for such sum, that relying on said representations plaintiffs put up \$16,200 for the purchase of a half interest in the land, that said representations were false and made to deceive and defraud plaintiffs, states a cause of action with sufficient clearness to authorize the introduction of evidence to support it, there being no demurrer filed. *Thompson v. Lyons*, 430.
4. **Discovery of Fraud: General Allegations.** Where plaintiff merely alleges that he did not discover the fraud until a certain date, and defendant, without questioning the sufficiency of the petition, goes to trial, he cannot complain that the petition did not sufficiently plead reasonable diligence to discover the fraud. Besides, where the bar to the action is first raised by defendant's plea of the statute of the state where the transaction occurred, and in reply to that plea plaintiff alleges that the facts constituting the fraud were not discovered by him until a certain date, and no objection to the sufficiency of the reply is made, there is no room for a complaint that the petition did not allege reasonable diligence to discover the fraud. *Ib.*
5. **Unsigned and Amended Petition: Conveyance by Defendant: Stipulation for Judgment.** The filing of an unsigned petition is the commencement of a suit, and the filing of an amended petition at the return term relates back to the filing of the original petition; and a suit in ejectment is properly brought against the owner and his tenant in possession; and if, after such amended petition is filed, the attorneys who sign it and the attorneys for defendants enter into and file in the case a stipulation for judgment in accordance with a final adjudication in another pending cause resting upon the validity of the same administrator's deed, such stipulation is binding on all the parties and their assignees, although one day before the suit was brought the defendant, by a deed not recorded until one day thereafter, had conveyed to intervenor; and intervenor is in no better position than he would be had the original petition been properly signed. *Norton v. Reed*, 482.
6. **Negligence: Safe Place: Narrow and Unlighted Platform.** A petition which states that deceased was ordered and directed to stand twelve feet above a concrete floor on a platform twelve inches wide, and while so standing to reach up six feet and regulate the dampers to a boiler; that the platform was unsafe, because too narrow for deceased to perform his labors with safety, because it

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had no railing to prevent a person on it from falling off and because it was inadequately lighted; and that, while performing the said work, deceased fell and was killed, states a cause of action. And particularly does the averment that it was dark on the platform tender an issue to be submitted to a jury. *Williamson v. L. & P. Co.*, 544.

7. **Conflict of Opinion: Recovery on Reply.** Decisions of the Supreme Court to the effect that plaintiff must recover, if at all, on a cause of action stated in the petition, and not on one stated in the reply, have no application to a decision of the Court of Appeals which rules, and properly so under the facts, that plaintiff's right to recover was limited to the cause of action stated in the petition. *State ex rel. Bush v. Sturgis*, 598.
8. **Common Law: Effect.** The effect of the statute of Kansas which provides that "the common law as modified by the constitutional and statutory law, judicial decisions, and the conditions and wants of the people shall remain in force in aid of the general statutes of this State" extends no further than to assert the common law to be there in force as therein stated, and to render unnecessary any presumption that might otherwise obtain an account of that State not having been carved out of the original territory subject to the law of England. Considered in any other sense, the pleading of the statute is a mere conclusion. *Musser v. Musser*, 649.
9. ———: **Definition: How Pleaded.** The common law is not "a true body of law" in the sense that it is collected into a code or any particular book; but it began in statements and principles announced in decisions of courts, which have been multiplied and modified by subsequent decisions, until they are regarded as accumulated and approved expressions of what is right and just. In this country, the common law is inseparably identified with judicial decisions, and what is the common law of any particular state is to be ascertained by an examination of its decisions, as precedents; and where an attempt is made to plead the common law of another state, the rules of decision of the courts of that state, as applicable to the particular case, are the things to be alleged, as the basis of the action. It is not sufficient to plead what counsel may think is the common law of the foreign state, but it, as well as its violations, must be pleaded with distinctiveness, as any other substantive fact. *Ib.*
10. ———: **Conclusions.** In pleading the decisions of another state from which the common law therein is to be determined, pertinent parts of such decisions should be alleged, in order to avoid the charge of stating mere conclusions. If the common law of such foreign state is the basis of recovery or the constitutive fact of plaintiff's case, mere conclusions as to what counsel may think the decisions of its courts may mean will not suffice. *Ib.*
11. ———: ———: **Private Charity.** In a suit to construe a will, devising property in Kansas and probated in that State, the will was alleged to be invalid for that it attempted to create a private charity, in violation of the common law in force in that State, and the petition, after a general averment "that the common law in force in Kansas is and was in part at all times mentioned as follows" proceeded, in several paragraphs, in some of them arbitrarily and in others argumentatively, to state what is alleged

## PLEADING—Continued.

- to be the law of Kansas relating to wills and charities and the powers and duties of the donee (a school district) in reference thereto, but alleging nothing either affirmative, definite or precise as to what is the actual common law of the State. *Held*, that it is essential that the common law of Kansas itself, as found in the court decisions of the State, be pleaded as any other fact, and the petition is not good as against a general demurrer. *Ib*.
12. ———: ———: **Ultimate Facts.** A petition, in stating the ultimate facts in regard to the common law of another state, relied on as the basis of the action, and not the law itself, is not sufficient. Ultimate facts are nothing more than issuable, constitutive or traversable facts essential to the statement of a cause of action, and are not mere conclusions as to what the facts are. *Ib*.
13. ———: **Demurrer: Admissions.** A general demurrer to a petition does not admit conclusions of law. Where the petition simply contains general averments as to what the common law of another state is, but does not plead that law itself as facts, a demurrer to it that it does not state facts sufficient to constitute a cause of action does not admit the common law of the State to be what the averments allege it to be. *Ib*.
14. ———: **Private Charity: Gift for Educational Purposes.** The Supreme Court of Kansas has never decided that every public charity must be such as the State may lawfully maintain by public taxation. Therefore, an allegation in the petition to construe a will by which property was bequeathed "for the purpose of creating an endowment for the education of worthy young men and women of a school district" in a named county, "preference to be given to those who are orphaned," that the will attempted to create a private charity, and that the gift was void because the object was not one which "the State itself ought and lawfully might endow and support with public resources," does not and cannot state a cause of action, because there are no decisions of that State so holding. *Ib*.

## POLICE REGULATIONS.

1. **Power of City: Use of Streets.** The charter-powers of the City of St. Louis to establish, locate, dedicate and supervise the highways of the city, and "to do all things whatsoever expedient for promoting the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufacture of the city or its inhabitants," having their origin in the police powers of the State, are ample to authorize the city by legislative enactment, not only to establish and improve its streets, but to prescribe the terms and conditions upon which they may be used, subject only to the Constitution and laws of the State. *Ex parte Lerner*, 18.
2. ———: ———: **Public Welfare: Subject to Constitutional Inhibition.** A city cannot enact a police regulation which contravenes either the Constitution or a statute enacted by the Legislature. An ordinance enacted in the exercise of the police power must be general in its nature and applicable alike to all persons who may properly come within its purview. It is not sufficient that its enforcement would promote the general welfare, for instance, that it would facilitate the public use of streets; but, to avoid constitutional inhibition, it must be general in its terms and uniform in its application. *Ib*.

## PRACTICE.

1. **Public Service Commission: Relief: Denial for Lack of Jurisdiction: Questions for Review.** When the Public Service Commission has dismissed the application of an interurban railway to discontinue the operation of certain spur tracks laid in the streets of a city, on the sole ground that it is without power to grant the relief, the question whether the franchise ordinance contains express provisions denying the company the right to take up a part of its tracks when the consent of the State is procured, and the question whether the ordinance in itself by its terms and conditions permits the company to remove unprofitable portions of its tracks, cannot be considered in an appeal from an order of the Commission refusing to consider the case on the ground that it had no jurisdiction. These are questions of fact and for determination by the Commission, and the power of the court is simply one of review, after jurisdiction has been assumed. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.
2. **Further Evidence After Demurrer.** To permit plaintiff to introduce further evidence after he has rested and after a demurrer to the case as then made has been argued is a matter within the trial court's discretion. *Crosby v. Evans*, 202.
3. **Finding of Facts.** A statutory finding of facts should embrace all the material facts bearing on the issues involved, and should set them out in detail, and not merely state conclusions and inferences therefrom. *Korneman v. Davis*, 234.
4. **Appeals: Affidavit and Bond: Wrong Name: Amendment.** An appeal from a judgment of a justice of the peace should not be dismissed because the affidavit and bond therefor were not made in the name of the appellant, if before a motion to dismiss is ruled an amended transcript showing the appeal had been taken in its true name is sent up, and an amended affidavit and bond, made by permission of court and by the same affiant and surety, are filed. *Donohue v. Ins. Co.*, 267.
5. —: **Dismissal of Case at Return Term.** Where the notice of an appeal from a judgment rendered by a justice of the peace was so defective as to constitute no notice, and appellee at the return term filed his motion to dismiss on the ground that no notice had been given, and appellant, before the motion was ruled, by permission of court filed an amended transcript and an amended affidavit and bond, and thereupon the motion was overruled, it was error to call the case for trial and, upon the appellee's refusal to plead further, to dismiss the case at said return term: for appellee's motion to dismiss was not an exercise of his option to try the case at said term, but his refusal to plead further was a protest against being forced to trial at a term at which, under the statute (Sec. 7583, R. S. 1909), the cause was triable only at his option. *Ib.*
6. **Negligence: Obvious Danger: Question for Jury.** Plaintiff testified that he knew and fully appreciated the danger attendant upon cleaning the boxing next to the revolving cog-wheel, but as the gears fed upward he thought he could reach over the axle and wipe the grease from the under side without his coat sleeve being drawn into the cogs. *Held*, that, whether the danger of so doing was so great that an ordinarily careful and prudent man would not have attempted it was a question for the jury. *Kuhn v. Lusk*, 324.

## PRACTICE—Continued.

7. **Demurrer: Admissions.** A general demurrer to a petition admits all facts well pleaded, but it does not admit allegations which are mere conclusions of the pleader. *Harelsan v. Tyler*, 383.
8. ———: **Refusal to Plead Further: Judgment: Appellate Practice.** Where defendants interposed a general demurrer to the petition, which the court sustained, and, upon plaintiff's declining to plead further, entered judgment on the demurrer, the only question for consideration upon an appeal by plaintiff is the sufficiency of the petition, and if it states a cause of action, either under the statute or at common law, the judgment will be reversed, but otherwise it will be affirmed. *Ib.*
9. **Constitutional Law: Sec. 10, R. S. 1909: Orders Made in Vacation.** Section 10, Revised Statutes 1909, authorizing the probate court, or judge thereof, in vacation, to refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children, is not violative of any provision of the Constitution. It gives to creditors and other interested parties opportunity to challenge the order by timely action in court; and, besides, the action of the court is not in strict sense judicial, but the statute is similar to many others enacted for the public convenience and to simplify the business before such courts, at a minimum cost, without injury to any one. *Parsons v. Harvey*, 413.
10. **Damages: Excessive: Contradictory Testimony: Question for Jury.** Where the testimony in regard to the value of plaintiffs' property, and the damages thereto caused by the construction of a seven-foot viaduct in the adjoining public street and the complete obstruction of their access thereto, is exceedingly contradictory, but sufficiently substantial, if believed, to support the verdict, and there is nothing in the record to indicate passion or prejudice on the part of the jury, it is the peculiar province of the jury to ascertain and determine the amount of damage, and the court will not interfere with their finding. *Witler v. St. Louis*, 457.
11. **Assignment: Cause of Action: Dismissal: Reinstatement: Writ Coram Nobis.** After the adjournment of the term, a case wrongfully dismissed cannot be reinstated by motion under Secs. 2219-2121, R. S. 1909, if there is nothing on the face of the record indicating that error had been committed. But if the motion is in the nature of a writ of error *coram nobis*, and points out a mistake made by the court, without the fault of movent, based upon a misapprehension of the actual facts, which, if known to the court at the time, would have precluded a dismissal, the cause may be reinstated in response thereto; for the purpose of a writ of error *coram nobis* is to enable the court to correct some error of fact, which did not appear in the record and which was unknown to the court when the order was made. *Norton v. Reed*, 482.
12. ———: **Unsigned and Amended Petition: Conveyance by Defendant: Pending Stipulation for Judgment.** The filing of an unsigned petition is the commencement of a suit, and the filing of an amended petition at the return term relates back to the filing of the original petition; and a suit in ejectment is properly brought against the owner and his tenant in possession; and if, after such amended petition is filed, the attorneys who sign it and the attorneys for defendants enter into and file in the case a



**PRACTICE—Continued.**

stipulation for judgment in accordance with a final adjudication in another pending cause resting upon the validity of the same administrator's deed, such stipulation is binding on all the parties and their assignees, although one day before the suit was brought the defendant, by a deed not recorded until one day thereafter, had conveyed to intervener; and intervener is in no better position than he would be had the original petition been properly signed, *Norton v. Reed*, 482.

**PRESUMPTIONS.**

1. **Identity of Name: Identity of Person.** Identity of person is to be presumed from identity of name. But the presumption may be overcome by credible evidence. The presumption only establishes a prima-facie case. The jury, or the court sitting as a jury, may believe or disbelieve such evidence; if believed, the presumption fails; if disbelieved, the presumption will authorize a verdict. *Brooks v. Roberts*, 551.
2. ———: ———: **Instruction: Reasonable Doubt.** An instruction on the presumption of identity of person arising from identity of name should not require the trier of the facts to find the identity of person beyond a reasonable doubt, or otherwise ignore the presumption. The term "reasonable doubt" or similar expressions have no place in instructions in a civil case. *Ib.*
3. **Conveyance: Existence of Deed: Payment of Taxes.** In the absence of any record, proof that a deed was made by the patentee to defendant's ancestor may be made either (1) by proof of such facts as will raise a presumption that such deed was made or (2) by direct evidence that such deed was made and had been lost or destroyed. But the presumption that a deed was made cannot arise from the mere payment of taxes for a period of years, either by such ancestor or his heirs or grantees; but ancient and long possession, coupled with other circumstances, will justify the presumption. Nor will evidence that defendant's ancestor was in possession of a patent, in which he was not named as patentee, aid the presumption that a deed was made by said patentee to him as grantee. And the presumption aside, and no record of a deed or possession of the land being shown, the evidence should show a deed in fact. *Ib.*

**PRINCIPAL AND AGENT.**

1. **Account Book: Entries by Amanuensis.** Entries made by the agent or under his direction, systematically, in the usual course of business and as minutes of the business, at the time the transactions occurred or as nearly so as the circumstances of the business will reasonably admit, whether made with his own hand or by other persons who wrote in his presence and pursuant to his orders, are regular and original entries, and the book in which they were made is competent evidence, in his favor and against him. *Dameron v. Harris*, 247.
2. **Agent's Compensation: In Excess of Agreement: Acquiescence.** Unless the owner assented to a charge of one hundred dollars annually instead of fifty dollars for the services of her bailiff in managing her large farm and protecting her financial affairs, he was bound by his contract, regardless of the importance and onerousness of his duties. But where the increase was indicated in

## PRINCIPAL AND AGENT—Continued.

the itemized accounts rendered, the value of the services far exceeded the compensation, and the evidence clearly establishes that she acquiesced in the increased charge, he is not chargeable with such increase. *Ib.*

## PROCEDURE.

**Violation of Ordinance: Civil or Criminal Proceeding.** While a prosecution for a violation of a city ordinance regulating the use of streets is technically a civil proceeding, yet in so far as it authorizes the imposition of a penalty upon conviction it partakes of the nature of a criminal action, and the validity of the ordinance is subject to the same rules of construction as is a criminal statute. *Ex parte Lerner*, 18.

PROFESSIONAL SERVICES. See **Employment.**

## PUBLIC SERVICE COMMISSION.

1. **Street Railway Spurs: Discontinuance.** The Public Service Commission has the power to authorize an interurban railway company, permitted by ordinance to lay its tracks in the streets of a city, to discontinue the use of spur tracks connecting the interurban system with railroad stations in said city, no longer essential to the operation of the interurban lines and operated at substantial loss.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that the Commission has no power to relieve a street railway company from its contractual obligation, imposed by its franchise ordinance, to maintain its tracks in designated streets for a designated period. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.

2. ———: ———: **Denial for Lack of Jurisdiction: Questions for Review.** When the Public Service Commission has dismissed the application of an interurban railway to discontinue the operation of certain spur tracks laid in the streets of a city, on the sole ground that it is without power to grant the relief, the question whether the franchise ordinance contains express provisions denying the company the right to take up a part of its tracks when the consent of the State is procured, and the question whether the ordinance in itself by its terms and conditions permits the company to remove unprofitable portions of its tracks, cannot be considered in an appeal from an order of the Commission refusing to consider the case on the ground that it had no jurisdiction. These are questions of fact and for determination by the Commission, and the power of the court is simply one of review, after jurisdiction has been assumed. *Ib.*
3. ———: ———: **Estoppel.** The question of estoppel in favor of a city, in consideration of conditions imposed upon a street railway company at the time a franchise ordinance to occupy the streets was enacted, does not arise in a case in which the public, represented by the Public Service Commission, is a substantial party. *Ib.*

## QUIETING TITLE.

1. **Under Old Section 650: Effect of Judgment.** Section 650, Revised Statutes 1899, contained no authority for a judgment affecting the

## QUIETING TITLE—Continued.

title of persons not parties or privies. It did not authorize a judgment transferring the title of defendants to plaintiff; all that a decree in a suit under it could do, if properly brought, was to debar and estop the defendants, whether unknown heirs or devisees of a supposed record owner, and those in privity and claiming under them by subsequent deed or right, from setting up, as against the plaintiff and those claiming under her, the title in judgment in that suit. And especially is that the effect of such judgment, if the petition did not pray that defendants' title be transferred to plaintiff. All such a suit, under that statute, could decide was that the defendants had no title and that plaintiff had full title; the judgment did not vest in plaintiff a record title of the ancestor of the unknown heirs. *Hayti Devlp. Co. v. Clayton*, 221.

2. **Limitations: Possession: Pertinent to Good Faith.** Although a suit to quiet title does not turn on the question of adverse possession, but on the issue of mutual mistake in the description of the land in the deeds under which defendants claim, testimony regarding their possession is pertinent for consideration, as showing their good faith and intention in the transaction out of which their claim originated. *Maze v. Boehm*, 507.
3. **Cotenants: Notice of Adverse Claim.** The institution of suit against the other descendants of an intestate decedent, by one of his children, in possession, to quiet title in her, is notice to them that an adverse possession is intended to be asserted against them. *Peper v. Union Trust Co.*, 562.
4. ———: **Arresting Running of Statute: No Action by Defendants Within Ten Years After Suit Brought.** Decedent had built a house and placed his daughter, the plaintiff, in possession, and she alleges it was a gift to her. He died intestate in 1903, and on January 27, 1904, she, being in possession, instituted suit against his other heirs, to have the title determined under the statute (Sec. 650, R. S. 1899); and on February 25, 1916, she filed her fourth amended petition, in which she averred that the property was given to her by her father, and that prior to his death she occupied the same and has since held the sole and exclusive, possession thereof, "claiming the same as the owner and adverse to all persons whomsoever." To this petition defendants filed their answer in which they each claim an interest in the property adverse to the claim of plaintiff, ask the court to determine the title, charge plaintiff with rents and decree partition; and their first answer, filed June 5, 1907, was to the same effect. *Held*, that, under Section 1879, Revised Statutes 1909, which provides that "no action for the recovery of lands or of the possession thereof shall be commenced or maintained, unless it appear that the plaintiff or other person under whom plaintiff claims was seized or possessed within ten years before the commencement of said action," defendants are barred and plaintiff has title by limitations, unless, within ten years after plaintiff entered into possession, defendants arrested the running of the statute by the filing of their answers, for plaintiff's first petition, in which she asserted sole ownership, imparted notice to them, as cotenants with her, that she claimed adversely to them; and all of defendants' answers or cross-bills being statutory actions to determine title, for rent and for partition, none of them had for their object the

**QUIETING TITLE—Continued.**

recovery of the premises, and none of them operated to arrest the running of the statute, and therefore plaintiff has the title by limitations. (GOODE, GRAVES and WOODSON, JJ., dissenting.) *Ib.*

5. ———: ———: ———: **By Demand for Rents.** A demand for rents set up in the answer to plaintiff's petition to determine title and asserting adverse possession, does not state an action for the recovery of the premises. *Ib.*
6. ———: ———: ———: **By Action to Quiet Title.** That portion of an answer or cross-bill which asks that the court ascertain and determine the title under the statute cannot be considered an action to recover land, such as is contemplated by Section 1879, Revised Statutes 1909, which says that no action to recover land or the possession thereof shall be commenced or maintained, unless it appear that plaintiff or other person under whom he claims was seized or possessed within ten years. The ten-year Statute of Limitations has no application to the bringing of a mere statutory action to determine title. *Ib.*
7. ———: ———: ———: **By Demand for Partition.** A suit in partition is not an action for the recovery of land, under the ten-year Statute of Limitations (Sec. 1879, R. S. 1909); and a count praying for a decree of partition, in a cross-bill in a suit to determine title, which in no wise asserts a possessory right of the defendants, cannot be considered an action to recover the land or its possession. *Ib.*
8. ———: ———: ———: **By Count in Ejectment.** By a separate count in ejectment in their answer or cross-bill to plaintiff's petition to determine title, or by any other sufficient allegations of facts for affirmative relief, in which they plead ouster, assert their right to possession and pray that they be restored to possession, made within ten years, defendants can arrest the running of the ten-year Statute of Limitations (Sec. 1879, R. S. 1909; but if no such possessory right is asserted in the answer or cross-bill, and it contains no denial of plaintiff's allegation, in her amended petition, of adverse and sole possession and claim of ownership for ten years, including the years which have expired since her suit was instituted, and the facts establish such possession in her, the running of the statute against defendants is not arrested. *Ib.*
9. **Adverse Possession: Creates Title.** Adverse possession, accompanied by the well-known prerequisites, for the statutory period, not only bars any action for recovery, but operates to vest the full legal title in the possessor. *Ib.*
10. ———: ———: **Consistent With Action to Determine Title.** An action to determine title is not only not inconsistent with, but is entirely consistent with, plaintiff's adverse possession. *Ib.*

**RAILROADS.**

1. **Street Railway Spurs: Discontinuance.** The Public Service Commission has the power to authorize an interurban railway company, permitted by ordinance to lay its tracks in the streets of a city, to discontinue the use of spur tracks connecting the interurban system with railroad stations in said city, no longer

## RAILROADS—Continued.

essential to the operation of the interurban lines and operated at substantial loss.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that the Commission has no power to relieve a street railway company from its contractual obligation, imposed by its franchise ordinance, to maintain its tracks in designated streets for a designated period. *Southwest Mo. R. R. Co. v. Pub. Serv. Comm.*, 52.

2. **Street Railway Spurs: Discontinuance: Restriction on City's Power: Constitutional Provision.** That provision of the Constitution (Section 20 of Article 12) which forbids the General Assembly to grant the right to construct and operate a street railway within a city, "without first acquiring the consent of the local authorities having control of the street" does not confer on the city power, either by ordinance or contract, to impose upon a public utility conditions of operation and maintenance which would confiscate its property or destroy its power to serve the public. This constitutional provision does not mean that a street railway, once properly admitted into the city, cannot be permitted by the State to take up an unprofitable portion of its tracks.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the franchise contract imposes on the street railway company the obligation to operate the tracks, the State, without the city's consent, cannot, under said constitutional provision, grant permission to abandon the tracks, since the city has the right to impose the condition, and the operation of the tracks is not an exercise of a police regulation, such as is the increase or decrease of fares. *Ib.*

3. ———: ———: **Consent of City: Abandonment of Track.** It cannot be ruled that if the street railway company is permitted to remove its tracks from a part of the streets which the city consented it might occupy with its tracks, the consent of the city to the company to enter was not given at all. *Ib.*
4. ———: ———: **Abandonment at Will.** A street railway company which has obtained the city's consent to occupy certain streets with its tracks cannot abandon any of them at its will. In no event can it abandon a street except upon a showing that the public will not be injured. *Ib.*
5. ———: ———: **Regulating Use.** The power of the city to regulate the use of streets which the city has consented a street railway company may occupy is to be ascertained by the contractual relation. The public service character of the company subjects it to regulation, but that fact does not determine whether the regulatory power extends to a particular thing. *Ib.*
6. ———: ———: **Permission to Occupy: Obligation.** A mere permission granted by the franchise ordinance to a railway company to occupy streets for forty-nine years is not a contract to operate for that period, nor can such an obligation be implied from the permission.

*Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that where the city has consented that a railway company may construct its lines in the streets upon condition that it operate them for 49 years, the condition is valid, does not transgress the police powers of the State, and can be abrogated only by consent of the city itself. *Ib.*

## RAILROADS—Continued.

7. ———: **Conditions Imposed by Franchise.** The constitutional provision (Section 20 of Article 12) merely secured from legislative interference the right of a city to deny entrance to a street railway, and the right to impose conditions is implied, but is not unlimited, for the conditions must be within the scope of municipal authority. The city cannot, in the exercise of its power to condition its consent, whether by franchise contract or otherwise, curtail the police power vested in the Legislature, nor draw under its dominion subject-matter not otherwise within its jurisdiction. *Held*, by GRAVES, J., dissenting, with whom WALKER, C. J., concurs, that a condition expressed in the franchise contract that a street railway shall operate its lines for a period of 49 years as the price of the city's consent to construct its tracks in designated streets is valid, does not contravene the police powers of the State, and therefore the Public Service Commission cannot grant to the company, without the city's consent, permission to abandon certain spur tracks, on the ground that their further operation is unprofitable and wasteful. *Ib.*
8. ———: ———: **Estoppel.** The question of estoppel in favor of a city, in consideration of conditions imposed upon a street railway company at the time a franchise ordinance to occupy the streets was enacted, does not arise in a case in which the public, represented by the Public Service Commission, is a substantial party. *Ib.*
9. **Jurisdiction: Venue.** A railroad company, whose line of road runs into only one county of the State and has an office or agent in no other, can be sued only in such county. *State ex rel. Hines v. Calhoun*, 583.
10. ———: ———: **Director-General of Railroads: Agent.** The usual and customary business of a railroad company consists in the receipt of freight and passengers at various points on its line, the transportation of them thereon, their delivery at other points thereon, the issuance of bills of lading, the sale of tickets, and the keeping of books and accounts of the company relating to such transactions; and the Director-General of Railroads, appointed under an act of Congress directing the President to take charge of, operate and control all railroads, is not such an agent in a county in which the railroad company which has caused plaintiff's injury has no place of business and into which its line of road does not run, and the circuit court of such county has no jurisdiction over the person of the Director-General, although he is found in the county and summons is served upon him therein. Whether or not the action for damages be grounded on the Employers' Liability Act, his duties and liabilities are just as broad territorially as were those of the railroad company before he took charge of its properties. If the railroad company could not have been sued in a county prior to that time, he cannot be. *Ib.*
11. ———: ———: ———: **General Orders 18-A and 18-B.** General Orders 18-A and 18-B of the Director-General of Railroads, providing that suits against carriers while under Federal control must be brought in the county or district where plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, cannot be construed to oust a state court of jurisdiction of the subject-matter of an action over which the laws of the State give it jurisdiction; but

## RAILROADS—Continued.

if the railroad company, whose lines are being operated by the Director-General, has a line of road in a certain county in this State, he can be sued in such county, provided he can be found there, though the service of summons would have to be made under Section 1751, and not under Section 1754, Revised Statutes 1909. *State ex rel. Hines v. Calhoun*, 583.

12. **Trespasser.** The rule that crossing signals are for the benefit of travelers on public highways and not for trespassers has no application where deceased was not a trespasser, but actually on the public street at the time the train struck him. *State ex rel. Bush v. Sturgis*, 598.

## REPUTATION.

1. **Impeachment: Place of Residence.** Objections to an inquiry of witnesses for their knowledge of plaintiff's general reputation in a given place, is not an objection to their competency to testify. *Ulrich v. C., B. & Q., Ry. Co.*, 697.
2. ———: **General: In Community.** Plaintiff is subject to impeachment like any other witness, and general reputation is admissible to prove his character as it exists at the time of the trial, and reputation, to be competent, must be made up of what is generally said of the witness by those who have sufficient opportunity to observe his life and actions, and ordinarily they are the persons in the neighborhood or community in which he resides, but it is not impossible for him to have a general reputation for veracity in more than one community. *Ib.*
3. ———: ———: ———: **Former Residence.** The discretion of the trial court is not abused by the admission of testimony relating to the witness's reputation in a community in which, beginning nine or ten years previously, he resided for several years, and in which he was widely and generally known and which he frequently revisited and there plied his vocation of selling spectacles and jewelry. *Ib.*
4. ———: ———: **Neighborhood and Community.** The term "neighborhood" or "community" is not susceptible of exact geographical definition, but means in a general way the place where the person has established a reputation, whether that be his present or former residence or place of business. It is not necessarily confined to a particular locality, but may be co-extensive with his residence or place of business, or both, or to places of present and former residence, if he in such places came into such frequent association with persons there as to establish a reputation. In the absence of a showing to the contrary, the inquiry as to his reputation should be confined to the neighborhood of residence; but where there are additional facts to show the establishment of a reputation elsewhere, the court does not abuse its discretion by permitting witnesses to testify what his general reputation in such other place is or was. *Ib.*

## RES IPSA LOQUITUR.

1. **Negligence: Agreed Statement.** If the petition pleads specific negligence, reliance upon the doctrine of *res ipsa loquitur* is thereby excluded; and a statement of facts agreed upon for the purpose of obviating the introduction of evidence does not alter the rule, for

## RES IPSA LOQUITUR—Continued.

such an agreed statement is not an agreed case under the statute or at common law. *Byers v. Essex Inv. Co.*, 375.

2. **Application to Situation.** The basis of the presumption inherent in the rule of *res ipsa loquitur* is the doctrine of probabilities. There is no such probability that the breaking of a wooden porch railing, which gave way when plaintiff's wife leaned against it, was due to negligence in repairing it ten months previously, as to justify an application of the rule, there being no showing that the part which gave way was repaired. *Ib.*
3. **Peculiar Knowledge: Voluntary Act.** The rule of *res ipsa loquitur* as establishing negligence on the part of the landlord does not apply where the cause of the fall of plaintiff's wife from the porch was not peculiarly within the knowledge of the landlord and peculiarly beyond that of plaintiff. Nor does it apply if the voluntary act of plaintiff's wife was immediately connected with her fall. *Ib.*

RESTRAINT OF TRADE. See **Trusts and Combinations.**

## SALES.

1. **By Corporation of Properties: Liability of Vendee for Unpaid Debts: Preference.** Where one company took from another a large amount of property, far in excess of the claim of a judgment creditor of the vendor, for which the said transferee paid no consideration and to which it acquired no title, and placed it beyond the reach of such creditor, such transferee company must pay such judgment creditor. The vendor has the undoubted right to prefer one creditor to another, but it cannot transfer the exercise of the right to another company, so as to authorize the transferee to administer the vendor's assets. [Per CRAMER, Special Judge; WILLIAMSON, J., concurring, in a separate opinion in which WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Railways Co.*, 247 Mo. 1. c. 366.] *Johnson v. United Rys.*, 90.
2. ———: ———: **Assets in Excess of Consideration.** Where one corporation, in consideration of the release of a lease under which another was operating a system of street railways, took over all its tangible assets, assuming to pay its bonded and other contract debts, but not existing judgments for personal injuries, and thereby received property far in excess of the amount of the debts assumed, without paying any consideration for such excess and without the consent of such judgment creditors, leaving their judgments unsatisfied, and took the property under such circumstances as to amount to actual notice of such outstanding claims, the transferee company is legally bound to pay such claims, since the assets of the transferring company constituted a trust fund for the payments of its debts, and a transfer of assets, without consideration, is void as to creditors of the transferor, though it assumed legal form. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS, J., concur; BLAIR, J., dissenting; GRAVES, J., with whom WOODSON, J., concurs, dissenting, for the reasons expressed by VALLIANT, C. J., in *Johnson v. United Rys. Co.*, 247 Mo. 1. c. 366.] *Ib.*



## SALES—Continued.

3. **Conditional Sale: Right of Heirs to Repurchase.** Some authorities holding an option to purchase property creates no interest that is either assignable or transmissible to heirs of the option-holder, are cited in the opinion, but the point is not ruled, because it is unnecessary to a proper adjudication of the issues. *Carson v. Lee*, 166.

## SETTLEMENT.

1. **Account Rendered: Implied Acquiescence and Promise.** An account rendered, showing a balance claimed by the creditor, unless objected to by the debtor within a reasonable time, is evidence that the debtor assented to it as correct and of an implied promise to pay the balance shown by it; and the rule applies to principal and agent, and to other persons who have business relations with each other, as well as to merchant and customer, or dealings between merchants. *Dameron v. Harris*, 247.
2. **Excavation: Measurements: Interpretation of Contract: Monthly Settlements.** The interpretation and construction which the parties themselves place upon a contract will be adopted by the court where the contract is ambiguous and reasonably susceptible of different constructions; but monthly payments of eighty-five per cent for work completed, and stated accounts showing the estimates of the excavation work done in cubic yards for trench work and the value thereof, do not indicate that by the words "cubic yards" was meant anything else than the statutory cubic yard, and are not to be considered as a construction of the contract that the contractor was not to be allowed double measurement for such work, as the statute required, unless there is special agreement to the contrary. *Const. Co. v. Gilsonite Const. Co.*, 629.

## SEWER.

1. **Sewer District: Lot: Definition.** Section 14 of Article 6 of the Charter of St. Louis relates, not to sewer districts, but to the construction of streets, boulevards and alleys, and the word "lot" used therein is required to be construed "as used in this section," and is not to be understood as a definition of "the lots of ground" and "the lots and parcels of ground" used respectively in Sections 21 and 22, which relate to district sewer and joint sewer districts, according to which assessments of benefits are made by area, and not by front-footage, and wherein the words "lot" and "parcels of ground" are used as equivalent terms. *State ex rel. Boatmen's Bank v. Reynolds*, 1.
2. ———: **Tax Bills: Against Lots Instead of Whole Tract: Dedication of Streets.** Where the recorded plat divided a tract into seven lots, designating streets and alleys thereon, separate tax bills to pay the costs of constructing a district sewer may, under the charter of St. Louis, be issued against the lots severally, and are not void because one tax bill was not issued against the tract as a whole, although the streets and alleys have not been actually established; nor is there anything in *Bambrick Bros. Construction Co. v. Semple Place Realty Co.*, 270 Mo. 450, that requires the assessment to be made by one tax bill against the entire tract. Nor was it necessary that there should have been a dedication of the streets and alleys to public use, according to the recorded plat, in order to give validity to the tax-bills. *Ib.*

## SEWER—Continued.

3. ———: ———: **Substantial Compliance With Charter Provisions.** If charter provisions concerning the assessment of benefits for a public improvement have been substantially complied with and the improvement has been made according to contract, irregularities which do not injuriously affect the interests of the property-owner should not be permitted to defeat a suit on the tax-bills; and where such is the case, a ruling by the Court of Appeals that such irregularities render the tax-bills void and in the same opinion denouncing the ruling as unjust, is in conflict with *Sheehan v. Owen*, 82 Mo. 458. *Ib.*
4. ———: ———: **Directory Provisions.** A charter provision concerning a district sewer which requires the issuance of "a special tax-bill against each lot in the district" should be held, in the absence of a showing of some loss or damage to the property owner, to be directory only; and where the sewer has been constructed in substantial compliance with charter provisions and the contract, a holding that such a requirement is mandatory and the tax-bills void because the entire assessment was not included in one tax-bill against the entire tract, is to confiscate the labor and material which went into its construction, and is in conflict with *Granite Bituminous Paving Co. v. McManus*, 244 Mo. 184. *Ib.*

## STATUTES AND STATUTORY CONSTRUCTION.

1. **Taxes: Assessed in Name of Another.** Sections 11374 and 11385, Revised Statutes 1909, must be read together, and when that is done they make the taxes a charge on the land under all circumstances, regardless of who the owner or prior lienors may be, regardless of the name or names in which the land is assessed, and regardless of any error or omission in that respect. So that where the owner was Albina C. Clements, and she had purchased a part of the land and acquired the balance by the will of C. C. Clements, and the deed and will had been recorded long before the assessments were made, an assessment made in the name of C. C. Clements as the owner did not invalidate the taxes, and her duty to pay them was just the same as it would have been had the assessments been made in her own name. *State ex rel. McKee v. Clements*, 195.
2. **Quieting Title: Under Old Section 650: Effect of Judgment.** Section 650, Revised Statutes 1899, contained no authority for a judgment affecting the title of persons not parties or privies. It did not authorize a judgment transferring the title of defendants to plaintiff; all that a decree in a suit under it could do, if properly brought, was to debar and estop the defendants, whether unknown heirs or devisees of a supposed record owner, and those in privity and claiming under them by subsequent deed or right, from setting up, as against the plaintiff and those claiming under her, the title in judgment in that suit. And especially is that the effect of such judgment, if the petition did not pray that defendants' title be transferred to plaintiff. All such a suit, under that statute, could decide was that the defendants had no title and that plaintiff had full title; the judgment did not vest in plaintiff a record title of the ancestor of the unknown heirs. *Hayti Devlp. Co. v. Clayton*, 221.
3. **Lost Corners: Conflict Between Statute and Land Office Rule.** If the statute pertaining to the re-establishment of decayed cor-

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

ners of surveyed lands (Sec. 11322, R. S. 1909) operated to change the boundaries of United States surveys, so that one who purchased land according to those surveys would be divested of a portion of it, and another who did not purchase such portion would be invested with it, the statute, in so far as it conflicts with the rules of the General Land Office pertaining to the re-establishment of lost corners, would be void, but the statute can have no application where the original boundaries are known or can be ascertained, for before it can be invoked it must appear that the corner is not merely obliterated, but is *lost*—that is, that its *locus* cannot be determined either from the plat and field notes of the original survey, or by any competent extrinsic evidence. *Simpson v. Stewart*, 228.

4. **Appeal: Non-resident Insurance Company: Twenty Days' Notice.** A foreign insurance company, licensed to do business in this State, but having no agent, office or other place of business in the county in which the cause was tried before a justice of the peace, has twenty days, under the statute (Sec. 7568, R. S. 1909), within which to take its appeal from the judgment rendered by the justice, and is not required to take the appeal within ten days after the rendition of judgment. *Donohue v. Ins. Co.*, 267.
5. ———: ———: **Service of Process.** The statute (Secs. 7398 and 7399, R. S. 1909), authorizing process to be served on the Superintendent of Insurance where the defendant is a foreign insurance company licensed to do business, but having no place of business, in this State, does not render the company a resident of the county in which plaintiff resides and in which it has been sued before a justice of the peace, but only confers jurisdiction; as to the time within which it must take an appeal from a judgment rendered by the justice, it still remains a non-resident of the county. *Id.*
6. **Administration: Presentation of Claims: Limitations: Exhibition to Administrator Within Six Months.** Section 195, Laws 1911, page 82, does not mean that the exhibition of a demand against the estate to the administrator for allowance within six months will alone stop the running of the special statute of limitations. A claimant cannot avail himself of the fact that he exhibited his demand, by notice and in due time, to the administrator, unless he also presents it to the court for allowance within the time prescribed by the statute. *Home Ins. Co. v. Wickham*, 300.
7. ———: ———: ———: ———: **Presentation to Court.** The Legislature did not intend by the amendatory Act of 1911, by striking out of Section 195 the words explicitly requiring demands to be presented to the court for allowance and substituting the words explicitly requiring it to be exhibited to the administrator for allowance, to make the section simply a reiteration of the requirement of Section 191, as amended, that a demand must be exhibited against the estate as provided in clauses five and six of Section 190, as amended, or be forever barred, but did intend to require a second exhibition to the administrator, the first being for the purpose of obtaining priority of classification, and the second for the purpose of having it allowed. Said Section 195, as amended, requires a demand to be presented to the court for allowance. At all times prior to 1911 and since 1855 two kinds of limitation sections have run along side by side in the Administration Statute, each serving different purposes and each indispensable and

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

distinct from the other, the one requiring demands to be exhibited to the administrator within a designated period, and the other requiring them to be presented to the court for allowance within a designated time. *Ib.*

8. ———: ———: **Exhibition to Administrator for Allowance.** The words "for allowance," used in Section 195 of the Administration Act of 1911, requiring the claimant to "exhibit his demand to the administrator in the manner provided by law, for allowance," are not positive enough to empower the administrator to allow a demand against an estate, or to imply that such power already existed. Demands must be established by the judgment of a court, and the requirement that a demand be exhibited to the administrator for allowance means an exhibition to him in a proceeding in court to have the claim allowed. *Ib.*
9. ———: ———: **Dismissal: Reinstated Within a Year.** Where the demand was exhibited to the administrator within six months after letters granted, and presented to the probate court more than six months after the last publication of notice, and then dismissed, a suit brought in the circuit court within one year after such dismissal, but more than one year after letters granted, or the last published notice, is barred by limitations, under the Act of 1911. The special limitation statute contained in said act controls, and the provision in the general limitation statute that a new action may be begun within one year after such dismissal does not apply. The exhibition of the demand to the administrator within six months does not stop the running of the special statute (Sec. 195, Laws 1911, p. 82) requiring the demand to be presented to the court for allowance "within one year after the granting of first letters on the estate, or the last insertion of the publication of notice of the grant of such letters." *Ib.*
10. ———: ———: **Inconsistencies in Section 195; Exception.** The second part of Section 195 of the Administration Act of 1911, permitting exhibition of a demand to the administrator at the usual term for final settlement, seems inconsistent with the first clause, which requires claims to be exhibited within a year from the granting of letters, since final settlement can occur no sooner than "the first regular term of the court after the expiration of one year." But said second part may be regarded as contemplating an exception to the regular procedure, and to allow a proceeding, commenced within the year, to be followed up in court as late as the term next succeeding the one at which final settlement would otherwise occur. The purpose was to permit a claimant whose second exhibition was within the year, but too late to follow it up in court within the year, to have a term, but only one, after the one for final settlement, to present it to the court; whereas a claimant who gave earlier notice under Section 203 would need no such grace. This ambiguity in Section 195, however, was cured by the amendment of 1917, Laws 1917, page 98. *Ib.*
11. **Construction: Reconciling Inconsistencies.** In order to prevent one statute, or a portion of one, from conflicting with the entire scope of legislative action touching the subject it is sometimes necessary to depart from a literal construction, and adopt the one that removes the inconsistency and produces harmony. *Ib.*
12. **Automobile: To Right of Center of Road.** The statute (Par. 9, sec. 8, Laws 1911, p. 327) requires the driver of an automobile to turn

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

to the right of the center in approaching a turn in the public highway only when he meets another person riding or driving a horse or another motor vehicle; if there is no other person or vehicle on the road, he has the right to use the center, and even the left side. *Jackson v. Tel. Co.*, 358.

13. **Combination: Uniform Charges for Personal Services.** An agreement by a voluntary association of men engaged in the same business whereby they bind themselves to charge uniform rates for personal services in buying and selling hay on commission is not within the prohibitions of the statutes against trusts and combinations in restraint of trade, for the reason that labor, whether physical or intellectual, is not by any fair rule of construction a "product or commodity" that is the subject of "importation, transportation, manufacture, purchase or sale" within the meaning of those words as used in the statute. *Harelsion v. Tyler*, 383.
14. ———: ———: **Competition: Restraint of Trade.** Notwithstanding the voluntary association was organized for the purpose of fixing, controlling and stabilizing the commission charges and brokerage fees of its members for buying and selling hay on a certain market, and minimizing competition in respect thereto, yet if nothing in the agreement directly or necessarily tends to a restraint of the trade, or is calculated to limit the quantity or to fix, regulate or control the price of the commodity or to lessen competition in the business of buying or selling it, the association is not a combination condemned by the statute. *Ib.*
15. ———: ———: **Inhibiting Dealings With Expelled Members.** A provision in the articles of association of a voluntary association, formed for the purpose of stabilizing the fees and commissions which its members may charge for buying and selling hay on a certain market, which debars them from trading with persons who have been suspended or expelled from membership for violating its rules, cannot, except incidentally and indirectly, affect the price which the producer receives for his commodity, and does not bring the association under the condemnation of the statute. *Ib.*
16. **Limitations: Arresting Running of Statute: No Action by Defendants Within Ten Years After Suit Brought.** Decedent had built a house and placed his daughter, the plaintiff, in possession, and she alleges it was a gift to her. He died intestate in 1903, and on January 27, 1904, she, being in possession, instituted suit against his other heirs, to have the title determined under the statute (Sec. 650, R. S. 1899); and on February 25, 1916, she filed her fourth amended petition, in which she averred that the property was given to her by her father, and that prior to his death she occupied the same and has since held the sole and exclusive possession thereof, "claiming the same as the owner and adverse to all persons whomsoever." To this petition defendants filed their answer in which they each claim an interest in the property adverse to the claim of plaintiff, ask the court to determine the title, charge plaintiff with rents and decree partition; and their first answer, filed June 5, 1907, was to the same effect. *Held*, that, under Section 1879, Revised Statutes 1909, which provides that "no action for the recovery of lands or of the possession thereof shall be commenced or maintained, unless it appear that the plaintiff or other person under whom plaintiff claims was

## STATUTES AND STATUTORY CONSTRUCTION—Continued.

seized or possessed within ten years before the commencement of said action," defendants are barred and plaintiff has title by limitations, unless, within ten years after plaintiff entered into possession, defendants arrested the running of the statute by the filing of their answers, for plaintiff's first petition, in which she asserted sole ownership, imparted notice to them, as cotenants with her, that she claimed adversely to them; and all of defendants' answers or cross-bills being statutory actions to determine title, for rent and for partition, none of them had for their object the recovery of the premises, and none of them operated to arrest the running of the statute, and therefore plaintiff has the title by limitations. (GOODE, GRAVES and WOODSON, JJ., dissenting.) *Peper v. Union Trust Co.*, 562.

17. **Excavations: Measurements: Statute Part of Contract.** The statute (Sec. 11971, R. S. 1909) applies to contracts for making earth excavations and must be read as a part of every contract pertaining thereto. Any rates expressed in the contract must be considered in connection with the statute. *Const. Co. v. Gilsonte Const. Co.*, 629.
18. ———: ———: **Trenches: Pier Holes: Special Agreement.** The statute (Sec. 11971, R. S. 1909) provides that earth excavations, where no special agreement is made as to measurements, shall be measured by the cubic yard, and that for trenches and pier holes double measurements shall be allowed. The contract provided that the price for excavating trenches should be \$1.15 "per cubic yard." *Held*, that there was no special agreement as to the measurement of trenches, but the contract called for the statutory "cubic yard," and the contract and statute, when considered together, meant that there should be twice as many cubic yards in the same number of cubic feet in the excavation of trenches as there are in other excavations. And the same is true of pier holes; where the contract said that the price for the excavation for pier holes should be \$2 "per cubic yard," it meant that the whole number of cubic yards of 27 cubic feet each thus excavated should be doubled. In each case the words "cubic yard" used in the contract, when applied to trenches and pier holes, meant just one-half the volume of an ordinary cubic yard. *Ib.*

## STATUTES CITED AND CONSTRUED.

## Revised Statutes 1909.

Section	9, see page 427.	198, see pages 311, 312.
	10, see pages 421, 422,	203, see pages 312, 313,
	425, 427, 429.	314.
	29, see page 427.	204, see pages 312, 313,
	82, see page 304.	314.
	120, see page 420.	205, see page 312.
	190, see page 304.	206, see page 312.
	191, see page 304.	238, see pages 305, 314.
	192, see page 305.	366, see pages 615, 616.
	193, see pages 305, 308.	404, see page 427.
	194, see page 305.	424, see page 427.
	195, see pages 306, 307,	546, see page 427.
	309.	1729, see page 489.
	197, see page 311.	1732, see page 494.

## STATUTES CITED AND CONSTRUED—Continued.

- 1751, see pages 593, 597.  
 1754, see pages 587, 594,  
     595, 596, 597.  
 1756, see page 493.  
 1848, see page 493.  
 1850, see page 493.  
 1851, see page 493.  
 1852, see page 493.  
 1879, see pages 581, 582,  
     587.  
 1895, see page 446.  
 1900, see page 312.  
 1907, see page 313.  
 2117, see page 382.  
 2119, see page 491.  
 2120, see page 491.  
 2121, see page 491.  
 2385, see pages 493, 494.  
 2535, see pages 224, 554,  
     558, 581, 613.  
 2868, see page 478.  
 2871, see page 219.  
 3326, see page 370.  
 4060, see page 314.  
 4335, see page 181.  
 4472, see pages, 519, 521,  
     522.  
 4478, see page 524.  
 4481, see pages 623, 625.  
 4552, see page 644.  
 4904, see page 628.  
 5108, see pages 645, 646.  
 5115, see pages 522, 625.  
 5285, see page 648.  
 5312, see page 648.  
 6708, see page 615.  
 7040, see page 273.  
 7042, see pages 273, 275.  
 7047, see pages 503, 504,  
     506.  
 7049, see pages 501, 502.  
 7052, see pages 503, 504,  
     506.  
 7398, see page 274.  
 7399, see page 274.  
 7568, see page 273.  
 7580, see pages 276-278.  
 7583, see page 277.  
 10289, see page 397.  
 10299, see page 397.  
 10300, see page 397.  
 10409, see pages 422, 424.  
 10412, see pages 422, 423,  
     424.  
 10413, see pages 422, 423,  
     424.  
 11322, see page 230.  
 11372, see page 199.  
 11373, see page 199.  
 11374, see page 199.  
 11375, see page 201.  
 11385, see pages 199, 200,  
     201.  
 11971, see page 632.  
 ch. 33, art. 10, see page  
     186.  
 ch. 101, art. 1, see page  
     423.

## Revised Statutes 1899.

- Section 187, see page 308.  
 188, see page 309.  
 189, see pages 307, 309.  
 650, see pages 224, 225,  
     226, 577.

## Revised Statutes 1889.

- Section 183, see page 308.  
 184, see pages 307, 308.  
 188, see pages 307, 308.  
 189, see page 310.  
 ch. 42, art. 10, see page  
     188.

## Revised Statutes 1879.

- Section 189, see page 307.

## Revised Statutes 1855.

- Section 6, page 153, see page 307.

## STATUTES CITED AND CONSTRUED—Continued.

**Laws 1917.**

Page 98, see page 316.

**Laws 1913.**

Pages 218-219, see pages 519, 521.

**Laws 1911.**

Pages 78-86, see page 304.

Page 82, see page 306.

Page 83, see page 305.

Page 84, see pages 305, 314.

Page 326, secs. 8, 9, see page 349.

Page 327, sec. 8, par. 3, see page 373.

Page 330, sec. 12, par. 9, see pages 350, 367, 368.

**Laws 1899.**

Page 39, see page 308.

**Laws 1872.**

Page 124, see page 201.

**Laws 1859.**

Page 280, see page 36.

**STREET.**

1. **Measure of Damages: Viaduct: Obstruction of Access.** Where a part of the street, two feet wide, between the seven-foot viaduct and plaintiff's property, had not been elevated but remained as it was before the viaduct was constructed in the street, there is no room in the case for an instruction telling the jury that one measure of plaintiff's damage is the amount of money it would cost to raise the surface of plaintiff's property to a level with the present surface of the viaduct. *Witler v. St. Louis*, 457.
2. ———: ———: ———: **Special Benefits.** Where access to plaintiff's property has been completely prevented on the east by the erection of a seven-foot viaduct in the north-and-south adjoining street, and has otherwise been shut off by a ninety-nine-year lease of the property on the south, north and west to a railroad company and the inclosure thereof by a fence, there can be no special benefits to their property by the construction of the viaduct, and the court is not authorized to instruct the jury to take special benefits into consideration as a set off to the damages sustained by them. *Ib.*

**SUMMONS.**

**Service: Non-resident Insurance Company: Jurisdiction: Statute.** The statute (Secs. 7398 and 7399, R. S. 1909), authorizing process to be served on the Superintendent of Insurance where the defendant is a foreign insurance company licensed to do business, but having no place of business, in this State, does not render the company a resident of the county in which plaintiff resides and in which it has been sued before a justice of the peace, but only confers jurisdiction; as to the time within which it must take an appeal from



**SUMMONS—Continued.**

a judgment rendered by the justice, it still remains a non-resident of the county. *Donohue v. Ins. Co.*, 267.

**TAXES AND TAXATION.**

1. **Assessed in Name of Another.** Sections 11374 and 11385, Revised Statutes 1909, must be read together, and when that is done they make the taxes a charge on the land under all circumstances, regardless of who the owner or prior lienors may be, regardless of the name or names in which the land is assessed, and regardless of any error or omission in that respect. So that where the owner was Albina C. Clements, and she had purchased a part of the land and acquired the balance by the will of C. C. Clements, and the deed and will had been recorded long before the assessments were made, an assessment made in the name of C. C. Clements as the owner did not invalidate the taxes, and her duty to pay them was just the same as it would have been had the assessments been made in her own name. *State ex rel. McKee v. Clements*, 195.
2. ———: **Owner's Remedy.** The statutory corrective for the failure of the assessor to discharge his duty in carefully entering the names of the owner in the "real estate book" is an action on his bond. The validity of the assessment is in no wise dependent upon his failure to use diligence to ascertain the name of the owner at the time the assessment is made. *Ib.*
3. ———: **Notice.** An assessment of land or lots in numerical order, or by plats and a "land list" in alphabetical order, in the manner prescribed by the statutes, imparts notice to the owner that the land is assessed and liable to be sold for the taxes chargeable thereon; and, when so assessed, the actual owner is not prejudiced because it was assessed in the name of another. *Ib.*

**TRIALS.**

1. **Appeal: Non-resident Insurance Company: Twenty Days' Notice.** A foreign insurance company, licensed to do business in this State, but having no agent, office or other place of business in the county in which the cause was tried before a justice of the peace, has twenty days, under the statute (Sec. 7568, R. S. 1909), within which to take its appeal from the judgment rendered by the justice, and is not required to take the appeal within ten days after the rendition of judgment. *Donohue v. Ins. Co.*, 267.
2. ———: **Dismissal of Case at Return Term.** Where the notice of an appeal from a judgment rendered by a justice of the peace was so defective as to constitute no notice and appellee at the return term filed his motion to dismiss on the ground that no notice had been given, and appellant, before the motion was ruled, by permission of court filed an amended transcript and an amended affidavit and bond, and thereupon the motion was overruled, it was error to call the case for trial and, upon the appellee's refusal to plead further, to dismiss the case at said return term; for appellee's motion to dismiss was not an exercise of his option to try the case at said term, but his refusal to plead further was a protest against being forced to trial at a term at which, under the statute (Sec. 7583, R. S. 1909), the cause was triable only at his option. *Ib.*

## TRAILS—Continued.

3. **Agreed Statement: Omissions and Ambiguities.** An agreed statement of facts upon which the case is submitted to the jury stands in lieu of a special verdict, and if it contain any ambiguity, or any fact necessary to a recovery is omitted, a judgment for defendant will on appeal be affirmed. *Byers v. Essex Inv. Co.*, 375.
4. **Instruction: Erroneous: Given by Court to Itself.** An erroneous instruction given by the court sitting as a jury to try the facts will work a reversal. In such case, the erroneous instruction in a law case is just as fatal as if the issues had been submitted to a jury and such instruction had been given to them as their guide. *Brooks v. Roberts*, 551.
5. **Objections: General.** Objections to testimony must be specific, and upon an adverse ruling thereon exceptions must be saved; otherwise, they may be disregarded on appeal. *State v. Stevens*, 639.
6. **Fair Trial: No Exceptions.** Where no objection was made to the admission of testimony that plaintiff's pretended injuries were simulated, no request was made that defendant's counsel be rebuked for their conduct or that the jury be discharged, and no exceptions were taken to the conduct of the trial in the manner complained of on appeal, it cannot be ruled that plaintiff was not afforded a fair and impartial trial. *Ulrich v. C., B. & Q. Ry. Co.*, 697.

## TRUSTS AND COMBINATIONS.

1. **Uniform Charges for Personal Services: Statute.** An agreement by a voluntary association of men engaged in the same business whereby they bind themselves to charge uniform rates for personal services in buying and selling hay on commission is not within the prohibitions of the statutes against trusts and combinations in restraint of trade, for the reason that labor, whether physical or intellectual, is not by any fair rule of construction a "product or commodity" that is the subject of "importation, transportation, manufacture, purchase or sale" within the meaning of those words as used in the statute. *Harelsom v. Tyler*, 383.
2. ———: ———: **Competition: Restraint of Trade.** Notwithstanding the voluntary association was organized for the purpose of fixing, controlling and stabilizing the commission charges and brokerage fees of its members for buying and selling hay on a certain market, and minimizing competition in respect thereto, yet if nothing in the agreement directly or necessarily tends to a restraint of the trade, or is calculated to limit the quantity or to fix, regulate or control the price of the commodity or to lessen competition in the business of buying or selling it, the association is not a combination condemned by the statute. *Ib.*
3. ———: ———: **Inhibiting Dealings With Expelled Members.** A provision in the articles of association of a voluntary association formed for the purpose of stabilizing the fees and commissions which its members may charge for buying and selling hay on a certain market, which debars them from trading with persons who have been suspended or expelled from membership for violating its rules, cannot, except incidentally and indirectly, affect the price which the producer receives for his commodity, and does not bring the association under the condemnation of the statute. *Ib.*

## TRUSTS AND COMBINATIONS—Continued.

4. **At Common Law: Civil Conspiracy: Definition.** A civil conspiracy is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened. *Harelsan v. Tyler*, 383.
5. ———: ———: **Uniform Commissions: Oppression.** Agreements and conduct by a voluntary association of commission merchants which evidence merely a purpose to enforce and maintain fixed and uniform commissions and charges for buying and selling hay on a certain market do not amount to a civil conspiracy; but where the articles of association and by-laws provided that all contracts of a firm having a member of the association were subject to its rules, and plaintiff's partner was a member, and a month after the dissolution of the firm the partner was expelled for failure to pay a fine previously assessed, and the firm itself had not violated the rules or been penalized, the association could not, upon the pretext that plaintiff was expelled from membership privileges, bar him from all business intercourse with the members of the association, and thereby oppressively destroy his business of buying and selling hay in the market and in effect drive him from the market; such conduct, under the common law, amounts to a civil conspiracy. *Ib.*

## TRUSTS AND TRUSTEES.

1. **Trust Fund: Failure of Objects: Cy Pres Doctrine.** Whether or not there has been a failure or a partial failure of the definite charitable objects for which a trust fund was created is a question of fact to be determined by evidence; and unless the evidence shows with reasonable certainty that there will be a permanent failure of at least a substantial portion of the objects of the trust, the question of further administration and disposition of the fund does not arise, nor can questions of what might be done with the fund were there a failure of the charitable objects be considered. *St. Louis v. McAllister*, 26.
2. ———: **Reinvestment.** The power of a court of equity to authorize the alienation of property belonging to a charitable trust should be exercised with caution, and should not be exercised at all unless it clearly appears that the proposed alienation would be for the benefit of the charity. So that where the trust fund consists of many tracts of real estate, and the estimates of the price at which it could be sold are one-half its value, and there is no evidence that if sold and the proceeds invested in Government or State bonds the income would amount to as large a net return as is now realized, a decree ordering all the real estate sold and the proceeds invested in bonds should not be rendered. *Ib.*
3. **Sale of Properties: By Corporation: Directors Trustee for Creditors.** To the extent to which the assets of a corporation may be regarded as a trust fund for its creditors, the directors are trustees of those assets for such creditors; and where a corporation transfers all its tangible assets to another, the president of such corporation is a trustee for the benefit of those persons who had existing claims against the corporation. [Per WILLIAMSON, J., with whom WALKER, C. J., and WILLIAMS J., Concur.] *Johnson v. United Rys.*, 90.

## TRUSTS AND TRUSTEES—Continued.

4. **Private Charity: Personal Injury to Patient: Recovery of Damages.** A charitable association is not liable in damages for personal injuries to its patients caused by the negligence of its trustees, servants or employees. The funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted or absorbed by claims arising from the negligence of the trustees or employees. *Nicholas v. Deaconess Home*, 182.
5. **Resulting Trust: Whence and How It Arises.** A trust results in favor of a party who furnishes the purchase money for real estate, when the title is taken in the name of another. It arises from the facts, not from an agreement, but regardless of and sometimes in spite of an agreement. *Bender v. Bender*, 473.
6. ———: **Presumption: Conveyance to Wife.** The presumption is that the grantee in a deed conveying real estate intends to hold the title in trust for the person who paid the purchase money. But that presumption is overcome by another where the husband pays the purchase price and his wife is named as the grantee, for then the presumption is that he intended the conveyance prima-facie as a provision for her. But the presumption that he intended the conveyance to operate as a settlement on his wife is rebuttable, but only under circumstances consistent with legal principles. *Ib.*
7. ———: **Coincident With Conveyance: Future Contingency: Express Trust.** A resulting trust must arise, if at all, at the instant the deed is taken. The transaction must be such that the trust arises the moment the title passes. If the trust in favor of the husband's children is made contingent upon the happening of an event in the future, such as the legal separation or divorce of the husband and wife, the children do not have a resulting trust in real estate paid for by the husband and conveyed to him and his wife. *Ib.*
8. ———: **Parol Agreement to Hold in Trust: Express Trust.** Allegations that the husband's money paid for the real estate and that it was conveyed to him and her upon an agreement that in case of their legal separation or divorce, she and he would convey to their three children, is grounded on an express trust, which cannot be established by parol. *Ib.*

**TURNTABLE CASES.** See **Nuisance.**

## VARIANCE.

1. **Between Theory of Trial and on Appeal: Conflict in Opinions.** A variance between the theory upon which the case was tried and the theory upon which the judgment was affirmed in the Court of Appeals, to be available in quashing its decision, must be of such a character as to constitute an essential factor in determining defendant's liability. The difference in the two theories must involve a matter essential to the rendition of the judgment affirmed. *State ex rel. Bush v. Sturgis*, 598.
2. ———: ———: **Immaterial.** The petition alleged that defendant's negligence consisted in its failure "to give the statutory signal, by bell or whistle, as the train approached and passed

## VARIANCE—Continued.

over the public crossing." The answer charged that "deceased went upon the railroad track in front of a running train, heedlessly and without looking or listening." The reply was that "the night was very dark, the engine without a headlight and pushing a car in front; and no signal whatever was given." The petition charged and the jury found that deceased reached the crossing by traveling a public highway. The Court of Appeals held that "if defendant's liability is to rest on the finding that the deceased approached the crossing along the public road" the verdict cannot stand, but also held that plaintiff's right to recover was not dependent on the manner in which he approached the crossing, but that the cause of his death was the manner in which the train approached the crossing, it being its duty, since he was actually on the public crossing when struck, to give him some effective warning, and its failure to do so was negligence. *Held*, that the variance was immaterial, and the decision of the Court of Appeals is not in conflict with previous decisions of the Supreme Court. *State ex rel. Bush v. Sturgis*, 598.

3. **Embezzlement: Accounting: Intent.** Where the crime charged embezzlement of a note by defendant as bailee, proof that, while the note was in defendant's possession only for the purpose of effecting its sale for the benefit of the owner, defendant pledged it to a bank as collateral to secure the payment of his own debt, is competent to prove the intent with which the conversion was committed, and being competent for that purpose it cannot be ruled to have been offered to establish an accounting, and consequently there was no variance. *State v. Stevens*, 639.

**VENDOR AND VENDEE.** See **Assignment**.

## VENUE.

1. **How Proven.** Venue in a criminal case may be established in the same way as any other material fact. It may be established by direct testimony, or it may be inferred by the jury from all facts and circumstances in evidence from which the inference may be reasonably drawn. The inference that the homicide was committed in the county in which the information was filed may be drawn from testimony showing that a certain school house was in the county and west of its east county line, and that deceased was shot 650 feet west of the school house. *State v. Palmer*, 525.
2. **Jurisdiction: Railroad.** A railroad company, whose line of road runs into only one county of the State and has an officer or agent in no other, can be sued only in such county. *State ex rel. Hines v. Calhoun*, 583.
3. **——: Director-General of Railroads: Agent.** The usual and customary business of a railroad company consists in the receipt of freight and passengers at various points on its line, the transportation of them thereon, their delivery at other points thereon, the issuance of bills of lading, the sale of tickets, and the keeping of books and accounts of the company relating to such transactions; and the Director-General of Railroads, appointed under an act of Congress directing the President to take charge of, operate and control all railroads, is not such an agent in a county in which the railroad company which has caused plaintiff's injury has no place of business and into which its line of road does not run, and the circuit court of such county has no jurisdiction over

## VENUE—Continued.

the person of the Director-General, although he is found in the county and summons is served upon him therein. Whether or not the action for damages be grounded on the Employers' Liability Act, his duties and liabilities are just as broad territorially as were those of the railroad company before he took charge of its properties. If the railroad company could not have been sued in a county prior to that time, he cannot be. *Ib.*

4. ———: ———: **General Orders 18-A and 18-B.** General Orders 18-A and 18-B of the Director-General of Railroads, providing that suits against carriers while under Federal control must be brought in the county or district where plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, cannot be construed to oust a state court of jurisdiction of the subject-matter of an action over which the laws of the state give it jurisdiction; but if the railroad company, whose lines are being operated by the Director-General, has a line of road in a certain county in this State, he can be sued in such county, provided he can be found there, though the service of summons would have to be made under Section 1751, and not under Section 1754, Revised Statutes 1909. *Ib.*

## VERDICT.

1. **Fraud and Deceit: Verdict of Jury.** The verdict of a jury in an action for fraud and deceit concludes the credibility of the witnesses who testified to the substantial facts necessary to support a petition stating a cause of action. *Thompson v. Lyons*, 430.
2. **Damages: Excessive: Contradictory Testimony: Question for Jury.** Where the testimony in regard to the value of plaintiff's property, and the damages thereto caused by the construction of a seven-foot viaduct in the adjoining public street and the complete obstruction of their access thereto, is exceedingly contradictory, but sufficiently substantial, if believed, to support the verdict, and there is nothing in the record to indicate passion or prejudice on the part of the jury, it is the peculiar province of the jury to ascertain and determine the amount of damage, and the court will not interfere with their finding. *Witler v. St. Louis*, 457.

**VIADUCT.** See *Cities*, 20 to 23.

## WAIVER.

**Suit in Another State: Attachment: Appearance: Constitutional Question.**

Since the defendant bank appeared generally in the Tennessee court, did not object to the jurisdiction of the court over the principal defendant in the attachment proceeding, did not assert the unconstitutionality of the Tennessee statute which authorized constructive service upon both, and, without any appearance whatever by the non-resident principal defendant, went to trial on the merits of the case, and was defeated, it will not now be permitted to deny the validity of the Tennessee judgment awarding a fund belonging to it to the plaintiff in that case as a creditor of the principal defendant therein; but in a suit by said principal defendant against said bank, in a Missouri court, to recover money placed to his credit in the bank, the question whether the adjudication by the Tennessee court that the plaintiff was indebted to the plaintiff in that attachment suit is binding upon the plain-

## WAIVER—Continued.

tiff in this, or was void for lack of jurisdiction, is for determination. *Palmer v. Bank*, 72.

## WILLS.

1. **Intention: Implied Life Estate.** In construing a will effect must be given to the intention of the testator and, if necessary to carry out that intention, an estate, such as a life estate, may arise by implication from the terms of the will. *Wetzel v. Hecht*, 610.
2. ———: **Life Estate or Homestead.** The will provided that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, that the will gave to testator's wife, not a homestead simply, to be terminated upon her subsequent marriage, but a life estate. *Ib.*
3. ———: **Homestead During Life.** Where the will declares that "my homestead shall be left intact so long as my wife lives," the estate of the wife cannot be terminated by her subsequent marriage without ignoring the words "so long as she lives," and also the word "intact." *Ib.*
4. ———: **Homestead and Quarantine.** If it be contended that by the word "homestead" used in the will declaring "my homestead shall be left intact as long as my wife lives" the testator had in mind the statutory homestead given by Section 6708, Revised Statutes 1909, whereby the widow, there being no minor children, is vested with a homestead during her life or widowhood, it may as well be contended that he had in mind Section 366, which provides that a widow, until dower be assigned, may remain in and enjoy the mansion house. *Ib.*
5. ———: **Quarantine and Assignment of Dower.** Under Section 366, Revised Statutes 1909, which provides that a widow may remain in and enjoy the mansion house until dower be assigned, her quarantine interest is not lost until dower is assigned, and by virtue of that interest she may maintain or defeat ejectment, or she may convey it and her grantee acquires the same right. And if the will declared "my homestead shall be left intact so long as my wife lives," her dower cannot be assigned during her life, and consequently her quarantine right must remain undisturbed as long as she lives, for otherwise the homestead could not remain "intact." By the words used the testator enlarged the estate which the statute gave his widow, and removed the contingency upon which it would terminate on her remarriage, and the result is a life estate by implication. *Ib.*
6. ———: **Reconciling Inconsistencies: The Word Survive.** The will declared that "my homestead shall be left intact as long as my wife lives. After she leaves the homestead Lillie shall have this as a home, and at her death it shall go to Carrie; if both survive and neither occupy the property, said property may be sold and proceeds divided among the two." *Held*, first, that by the word "survive" he meant if the two daughters survive the lifetime of the widow; *second*, that by the words "after she leaves the homestead" he did not mean "if she leaves," but meant any contingency by which she separated herself from the control of the property,

## WILLS—Continued.

either by death, marriage or abandonment, but that neither marriage nor abandonment would divest her of her quarantine right, which could be done only by her death. Thus construed, the apparent inconsistencies are harmonized, and the result is a life estate to her. *Ib.*

## WRIT CORAM NOBIS.

**Assignment: Cause of Action: Dismissal: Reinstatement.** After the adjournment of the term, a case wrongfully dismissed cannot be reinstated by motion under Secs. 2119-2121, R. S. 1909, if there is nothing on the face of the record indicating that error had been committed. But if the motion is in the nature of a writ of error *coram nobis*, and points out a mistake made by the court, without the fault of movent, based upon a misapprehension of the actual facts, which, if known to the court at the time, would have precluded a dismissal, the cause may be reinstated in response thereto; for the purpose of a writ of error *coram nobis* is to enable the court to correct some error of fact, which did not appear in the record and which was unknown to the court when the order was made. *Norton v. Reed*, 482.





# Rules for the Government of the Supreme Court of Missouri.

REVISED TO APRIL 12, 1921.

**Rule 1.—Chief Justice, Duty.** The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

**Rule 2.—Motions to be Written, etc.** All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse party, or his attorney.

**Rule 3.—Argument of Motions.** No motion shall be argued unless by the direction of the court.

**Rule 4.—Diminution of Record, Suggestion after Joinder in Error.** No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

**Rule 5.—Application for Certiorari.** Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

**Rule 6.—Reviewing Instructions.** To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

**Rule 7.—Bills of Exceptions in Equity Cases.** In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

**Rule 8.—Presumptions in Support of Bills of Exceptions.** In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contain all the evidence applicable to any particular ruling to which exception is saved.

**Rule 9.—Making up Transcripts.** Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summonses.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

**Rule 10.—“Appellant” and “Respondent:” What They Include.** Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

**Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served.** Where the appellant shall, under the provisions of Section 1479, Revised Statutes 1919, file a copy of the judgment, order or decree in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstracts at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstracts upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

If the respondent desires to make objections to the consideration of any question because appellant's abstract of the record fails to show the timely filing or the overruling of the motion for new trial or in arrest of judgment, or that the ruling on any such motion was excepted to, or that the bill of exceptions was duly signed or filed, or that the appeal was duly taken, such objections and the reasons therefor shall be served in writing on the appellant or his counsel, fifteen days before the day on which the cause is docketed for hearing, or within fifteen days after the abstract is served. Any such objections not so specified shall be deemed waived and will not be considered by the Court. After service of such objections and reasons appellant shall have ten days within which to perfect his abstract of the record by filing in this Court a certified copy of so much of the record proper or bill of exceptions as will show the true entries, orders or rulings with respect to which the sufficiency of the abstract of the record is challenged by respondent. [Adopted as an amendment to Rule 11, December 29, 1920.]

**Rule 12.—Abstracts: When Filed and Served.** Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

**Rule 13.—Abstracts: What They Shall Contain.** The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be paged and have a complete index at the end thereof, which index shall specifically identify exhibits where there are more than one, and said abstracts shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

If in any case any matter which should properly be set forth in the abstract as a part of the record proper, shall appear in the abstract as a part of the bill of exceptions, or vice-versa, such matter shall be considered and treated as if set forth in its proper place, and all objections on account thereof shall be deemed waived, unless the other party shall, within fifteen days after the service of such abstract upon him, specify such objections and the reasons therefor in writing and serve the same upon the opposing party or his counsel; and in the event such objection be so made, the other party may within ten days from the service of such written objection upon him or his counsel, correct his abstract so as to obviate such objection, if under the facts as shown by the record proper or the bill of exceptions in the trial court, such correction can truthfully be made. [Adopted as an amendment to Rule 13, December 31, 1920.]

**Rule 14.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

**Rule 15.—Briefs: What to Contain and When Served.** The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth. [As amended and adopted October 23, 1917.]

**Rule 16.—Failure to Comply with Rules 11, 12, 13 and 15.** If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13, and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

**Rule 17.—Costs: When Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under Section 1479, R. S. 1919, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases

brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

**Rule 18.—Service of Abstracts and Briefs.** Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

**Rule 19.—Service of Abstracts and Briefs in Criminal Cases.** Attorneys for appellants in criminal cases in which transcripts have been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

**Rule 20.—Taking Record from Clerk's Office.** No member of the bar shall be permitted to take a record from the clerk's office.

**Rule 21.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision con-

flicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

**Rule 22.—Extension of Time.** Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

**Rule 23.—Notice to Adverse Party.** A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

**Rule 24.—Transfers to Court *En Banc*.** A motion to transfer a cause under the provisions of the Constitution from either division to Court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

**Rule 25.—Return of Original Writs.** Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

**Rule 26.—Assignment of Motions in Civil Causes.** All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

**Rule 27.—Assignment of Criminal Causes.** All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

**Rule 28.—When Appeal is Returnable: Certificate of Judgment: Transcript.** Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by Section 1479, Revised Statutes 1919, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said Section 1479 a certificate of judgment and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as when required by said Section 1479, Revised Statutes 1919.

**Rule 29.—Oral Arguments.** The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator, in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

**Rule 30.—Letters, etc., to Court.** All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

**Rule 31.—Record Matters on Appeal.** Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

**Rule 32.—Granting Original Writs.** No original remedial writ, except *habeas corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

**Rule 33.—Procedure as to Original Writs.** Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

**Rule 34.—Certiorari to Courts of Appeals.** No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

















